TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 32

UNITED STATES OF AMERICA, EX REL. LEE KUM HOY, LEE KUM CHERK, AND LEE MOON WAH, PETITIONERS,

vs.

JOHN L. MURPHY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1956
CERTIORARI GRANTED JANUARY 14, 1957

INDEX

PART I. COURT PAPERS

	Page of Appendix	Page of Record
Docket Entries	1a	A-C
Petition for Writ of Habeas Corpus	5a	1-4
Amendment to Petition for Writ of Habeas Corpus	9a	5
Writ of Habeas Corpus	10a	10
Return to Writ of Habeas Corpus	11a	11-19
Traverse to Return	20a	20-31
Affidavit of Lee Ha and Wong Tew T[illegible]	34a	32-33
Opinion Filed September 17, 1953 (115 F. Supp. 302), Conditionally Sustaining Writ of Habeas Corpus	36a	34-50
Order Filed October 21, 1953, Conditionally Sustaining Writ	52a	78-79
Unsigned Proposed Order for Dismissal of Writ of Habeas Corpus	53a	108-109
Opinion Filed September 1, 1954 (123 F. Supp. 674), Conditionally Sustaining Writ	55a	97-106
Order Filed September 16, 1954, Conditionally Sustaining Writ	63a	110-111
Unsigned Proposed Order for Dismissal of Writ	65a	151-152
Affidavit of Harold J. Raby, Sworn to June 7, 1955, in Support of Application to Dismiss Writ	67a	153-156

	Page of Appendix	Page of Record
Opinion Filed August 8, 1955 (133 F. Supp. 850), Sustaining Writ	69a	140-149
Respondent's Notice of Motion for Reargument	78a	157
Affidavit of Harold J. Raby in Support of Respondent's Motion for Reargument	79a	158-161
Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument	83a	162-168
Supplemental Affidavit of Dorris E. Yarbrough in Support of Respondent's Motion for Reargument	91a	188-197
Supplemental Affidavit of A. J. Nicholas in Support of Respondent's Motion for Reargument	100a	198-199
Reply Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument	102a	169-172
Reply Affidavit of Harold J. Raby in Support of Respondent's Motion for Reargument	106a	206-210
Answering Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument	109a	173-179
Order Filed October 5, 1955, Sustaining Writ	115a	200-201
Respondent's Amended Notice of Appeal	117a	204-205
Relators' Notice of Cross-Appeal	119a	211
Stipulation and Order	121a	212

PART II. EXCERPTS FROM RECORD OF ADMINISTRATIVE PROCEEDINGS

App. Page

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952 ..... 123a

Decision of Board of Immigration Appeals of May 11, 1953, Dismissing Appeal 154a

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September 17, 1953; Reported in 115 F. Supp. 302 ..... 161a

Decision of Special Inquiry Officer, Dated December 9, 1953 ..... 225a

Decision of Board of Immigration Appeals, Dated April 12, 1954, Remanding for Further Proceedings 237a

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal 239a

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674 274a

Decision of Special Inquiry Officer, Dated January 18, 1955 ..... 382a

Decision of Board of Immigration Appeals, Dated May 5, 1955, Dismissing Appeal 392a

	Original	Print
Proceedings in U.S.C.A. for the Second Circuit	402	402
Appendix to appellees' brief containing the proceedings before the Board of Immigration Appeals	402a	402
Exhibit 27—Letter from Irwin J. Cohen to Ben Gim, dated November 23, 1954	402a	402
Exhibit 28—Letter from David Kaufman to Ben Gim, dated November 26, 1954	404	404
Exhibit 29—Letter from Andrew Reiner to Benjamin Gim, dated November 24, 1954	406	405
Exhibit 30—Statement of Edward Hong	409	407
Exhibit 31—Letter from Jackson G. Cook to Ben Gim, dated December 8, 1954	413	410
Exhibit 31—Letter from Hong & Gim, by Ben Gim to Board of Immigration Appeals, dated March 11, 1955	415	411
Opinion, Hincks, J.	418	414
Dissenting opinion, Frank, J.	428	425
Judgment	436	429
Clerk's certificate (omitted in printing)	438	430
Order allowing certiorari	439	430

PART I. COURT PAPERS

Docket Entries

(A)

DATE		
July 13–53	Filed	pet'n for and issued writ of habeas corpus ret. 7-14-53.
July 14–53	"	amended pet'n.
Aug. 3–53	"	affdvt & show cause order, admit relators to bail—ret. 8-3-53.
Aug. 5–53	Memo	endorsed on show cause of 8-3-53—Denied—Dimock, *J.*
Sept. 17–53	Filed	writ.
Sept. 17–53	"	return to writ.
Sept. 17–53	"	traverse.
Sept. 17–53	"	opinion #20668. Writ will be sustained unless hearing before Board is reopened within 20 days from date or order to be entered—Dimock, *J.*
Oct. 9–53	"	affdvt & show cause order to reargue writ—Memo end.—Motion denied—Dimock, *J.*
Oct. 9–53	"	writ (unsigned)
Oct. 9–53	"	opposing affdvt.
Oct. 21–53	"	order sustaining writ unlesss hearing before Board of Special Inquiry is reopened within 20 days, etc.—Dimock, *J.* —Mailed notice of entry 10-22-53.

(B)

DATE		
Oct. 21–53	Filed	unsigned counterorder.
Dec. 30–53	"	affdvt of L. Friedman.
Mar. 23–54	"	affdvt & show cause order—Admit relator to bail pending determination of action—ret. 3-25-54.
Mar. 31–54	Memo	endorsed on show cause filed 3-23-54—Denied—So ordered—Dimock, *J.* Mailed notice of entry 4-1-54.
Mar. 31–54	Filed	opposing affdvt.
Sept. 1–54	"	opinion #21344. Writ will be sustained unless hearing before Board of Inquiry is reopened within 20 days from date of order to be entered, etc.—Dimock, *J.* (See opinion)
Sept. 1–54	"	unsigned order.
Oct. 4–54	"	order that writ will be sustained unless hearing before Board of Special Inquiry is reopened within 20 days, etc.—Dimock, *J.* Mailed notice of entry 10-5-54.
Oct. 19 54	"	stip. & order paroling relators on bond pending disposition of writ, etc.—Dimock, *J.*
Oct. 28–54	"	affdvt & notice of motion by relators to produce—ret. 11-4-54.

DATE	
Nov. 4–54	Memo endorsed on show cause filed 10-28-54 —Referred to Dimock, *J.*—Ryan, *J.*
Nov. 17–54	Filed opinion #21,498. Motion for production, etc. denied—Dimock, *J.*
Nov. 17–54	" opposing affdvt.
Nov. 19–54	" affdvt & notice of motion by deft. to vacate request for interrogatories—ret. 11-23-54.
Nov. 23–54	Memo endorsed on motion filed 11-19-54—Referred to Dimock, *J.*—McGohey, *J.*
Dec. 1–54	Filed opposing affdvt to motion to vacate interrogatories.
Nov. 29–54	2nd Memo endorsed on motion filed 11-19-54—Granted—Dimock, *J.*
Aug. 8–55	Filed opinion #86-269—Writ of habeas corpus sustained—Dimock, *J.*—Mailed notice of entry 8-9-55.
Aug. 8–55	" unsigned order.
Aug. 16–55	" Notice of motion for reargument—Ret. 8-23-55
Aug. 24–55	" Affdvt. in opposition to motion for reargument.
Aug. 23–55	Memo endorsed on motion filed 8-16-55. Respectfully referred to Judge Dimock, Herlands, *J.*
Sept. 29–55	Filed reply affdvt to opposition to motion for reargument.

DATE		
Sept. 29–55	Filed	relator's reply affdvt.
Sept. 29–55	"	relator's supplemental affdvts.
Sept. 27–55	2nd Memo	endorsed on motion filed 8-16-55—Denied—Dimock, *J.*—Mailed notice of entry 10-3-55.
(C)		
Oct. 3–55	Filed	pltff's unsigned proposed order.
Oct. 5–55	"	deft's notice of appeal (Mailed copy to Hong & Gim 10-5-55)
Oct. 5–55	Ord	sustaining writ signed by Judge Dimock and filed this date. (Filed as an unsigned order 10-3-55) —Mailed notice of entry 10-7-55.
Oct. 6–55	Filed	respondent's amen[illegible] notice of appeal (Mailed copy to Hong & Gim 10-7-55).
Oct. 6–55	"	respondent's reply affdvt.
Oct. 7–55	"	relators' notice of cross-appeal (Mailed copy to US Atty 10-10-55)
Oct. 10–55	"	stip. & order release relators on their own recognizance, etc.—Clancy, *J.*
Nov. 15–55	"	stip. & order extending time to file appeal record to 1-3-56—McGohey, *J.*
Feb. 1–56	"	Relators' interrogatories.
Feb. 1–56	"	Relators' opposing affdvt to application for dismissal, order.
Feb. 1–56	"	unsigned proposed order to sustain writ.

Petition for Writ of Habeas Corpus

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 86-269

UNITED STATES OF AMERICA, ex rel. LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH

—against—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service

---

To the Honorable Judges of the United States District Court for the Southern District of New York.

The petition of Lee Ha respectfully shows and alleges:

1. That he is a citizen of the United States and resides at 125 Mott Street, City and State of New York; that he is the father of the relators Lee Kum Hoy, age 21, Lee Kum Cherk, age 14, his two sons, and Lee Moon Wah, his daughter, age 13, all of whom are citizens of the United States by birth and by provisions of the laws of the United States; and that he is authorized by the aforementioned children to make this petition for a writ of habeas corpus.

2. That the aforesaid Lee Kum Hoy was born on September 8, 1930, Lee Kum Cherk on May 19, 1939, and Lee Moon Wah on June 20, 1940, and that their place of birth was in Kwangtung, China.

3. That the aforesaid relators by reason of their citizenship, have a right to enter the United States, but that they have been excluded by the Immigration and Naturalization Service and have been ordered deported and are about to be placed aboard the American President Lines for deportation out of the United States into Communist China on or about July 16, 1953.

(2)

4. That the relators, Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah, the latter two being children, 14 and 13 years of age, respectively, have been unlawfully restrained of their liberty for over a year at Ellis Island, New York Harbor, New York, which is within the Southern District of New York, and that such restraint and imprisonment of children of such tender years is cruel and inhuman and seriously impairs their physical and mental well being.

5. That the relators are about to be deported to Communist China on the American President Lines; that such deportation as ordered by the Immigration and Naturalization Service is contrary to law, to wit, Section 243(h) of the Immigration and Nationality Act of June 27, 1952; 66 Stat. 163, in that such deportation is being effected prior to any opinion from the Attorney General as to whether such deportation would subject the relators to physical persecution.

6. That Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah are unlawfully and forcibly restrained of their liberty by Edward J. Shaughnessy, the District Director of the Immigration and Naturalization Service, the Commis-

sioner of Immigration, the Board of Immigration Appeals in refusing them permission to enter the United States, which decision is contrary to law in the following particulars:

(1) The Board of Special Inquiry acted in an arbitrary and unreasonable exercise of their authority in rejecting the aforesaid three children's claim to citizenship on evidence based solely on admittedly conflicting and inaccurate blood tests conducted by unidentified persons whose qualifications to conduct such tests were undetermined.

(2) The Board of Special Inquiry abused their discretion and acted in an unreasonable and arbitrary manner by disregarding overwhelming and uncontradicted evidence in support of the claim of citizenship of the three children.

(3)

(3) The aforesaid three children were denied due process of law and did not have a fair hearing by the Board of Special Inquiry in that the Board unreasonably and arbitrarily rejected counsel's request to examine the qualifications of the unidentified individuals who conducted the blood tests of the three children and their parents, and the Board also refused a similar request to examine the author of an article on blood tests which was placed in evidence against the three children by the Board.

7. That the relators are entitled by law to a judicial hearing of their sworn claim that they are citizens of the United States, and they are further entitled to be admitted pending the determinatioin of such proceedings in order that they may be able to prepare properly their case for presenfation in court.

8. That the petitioner has requested the release of the relators on bond from the Board of Special Inquiry, the Commissioner of Immigration, and the Board of Immigration Appeals; that this request was denied by all these agencies; and that such refusal to release the relators on bond is a violation of their rights.

9. That relators have appealed to the Board of Immigration Appeals in Washington, D. C., but that Board has dismissed the appeal and sustained the exclusion and deportation order of the Board of Special Inquiry; and that relators have exhausted their administrative remedies and there is nothing further that they can do.

10. That the facts upon which this petition is based were obtained by examination of the records of the Immigration and Naturalization Service.

11. That no previous application has been made for this type of relief to any court or judge.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus may be issued directed to Edward J. Shaughnessy, District Director of Immigration and Naturalization (4) or any of his deputies, requiring them to bring before this Court forthwith the bodies of Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah, to do and receive what the Court shall then and there consider and then and there show cause, if any he may have, for the taking and detention of the aforementioned children.

Your petitioner further prays that the Court order the immediate release on such conditions as the Court may prescribe of the aforementioned children, pending the ultimate determination of the legality of the imprisonment,

restraint and detention of these children and thereupon dispose of this case at law and justice may require.

LEE HA
Lee Ha

(Verified July 10, 1953.)

Amendment to Petition for Writ of Habeas Corpus

(5)

[SAME TITLE]

To the Honorable Judges of the United States District Court for the Southern District of New York.

Petitioner Lee Ha amends his petition, as of course, under the provisions of Rule 15(a) of the Federal Rules of Civil Procedure and 28 U. S. C. Section 2242 in the following respects:

1. Paragraph 6, pages 2 and 3, is amended by adding thereto the following sub-paragraphs:

(4) That neither the Board of Special Inquiry, the District Director of the Immigration and Naturalization Service or the Commissioner of Immigration is authorized by statute or any rule or regulation to require the petitioner, his wife, or any of the relators to submit to blood tests.

(5) That the Board of Special Inquiry, the District Director of the Immigration and Naturalization Service, and the Commissioner of Immigration have proceeded and

are proceeding contrary to law and the Constitution of the United States by requiring Chinese persons applying for admission to the United States and their parents to submit to blood tests while imposing no such condition for applicants of other races.

LEE HA
Lee Ha

(Sworn to July 14, 1953.)

Writ of Habeas Corpus

(10)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

The President of the United States to Edward J. Shaughnessy, District Director of Immigration and Naturalization Service, United States Department of Justice and His Employees, Said Persons Having the Custody of Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah.—GREETING:

We command you that you have the body of Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah, by you imprisoned and detained as it is said, together with the cause of such imprisonment and detention by whatever name the said Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah, may be called, and charged before me, or one of the Judges of the United States District Court for the Southern District of New York at Room 506 of the United States Courthouse on the 14th day of July 1953 at 10:00 A. M. in the forenoon of that day, or as soon thereafter as counsel can be heard, so as to do and receive what

shall be then and there be considered and adjudged concerning the said Lee Kuni Hoy, Lee Kum Cherk, and Lee Moon Wah, and have you then and there this Writ.

WITNESS, Honorable John C. Knox, Chief Judge of the United States District Court for the Southern District of New York at the United States Courthouse, Foley Square.

WILLIAM V. CONNELL
Clerk of the United States District Court for the Southern District of New York.

The foregoing Writ is hereby allowed
this 13th day of July 1953

EDWARD WEINFELD
U. S. D. J.

Return to Writ of Habeas Corpus

(11)

[SAME TITLE]

I, LESTER FRIEDMAN, Attorney in the Office of the District Counsel, Immigration and Naturalization Service, United States Department of Justice, hereby certify and make return to the writ of habeas corpus herein, based on the records of the Immigration and Naturalization

Service, which are incorporated herein by reference, as follows:

1. The relators, Lee Kum Hoy, Lee Kum Cherk and Lee Moon Wah, are two boys and one girl, who claim to be brothers and sister. They were born in China and arrived for the first time in the United States from Hong Kong on June 17, 1952. The relators claimed to be citizens of the United States by virtue of the citizenship of their alleged father pursuant to the provisions of Section 1993 of the revised statutes of the United States and Section 201(b)(g) of the Nationality Act of 1940.

2. The relators, at the time of their arrival in the United States, were not in possession of birth certificates or other evidence of their identity, nationality or relationship to their alleged father. Since they were not clearly admissible to the United States, they were detained by the boarding immigration inspector for a hearing before a Board of Special Inquiry in accordance with then existing statutes and regulations.

3. Commencing on August 15, 1952, the relators were accorded a due and appropriate hearing before a duly authorized and duly appointed Board of Special Inquiry. The aforesaid hearing was continued and concluded on September 18, 1952, at which time, it was the decision of the Board of Special Inquiry that relators, having failed to establish their claimed identity and relationship or United States citizenship through citizenship of their alleged father, were inadmissible to the United States, in

that they were immigrants not in possession of unexpired immigration visas as required by law and that they were subject to exclusion on the further ground that they were not in possession of passports or other travel documents in lieu thereof as required by law.

4. In the course of the exclusion hearings, the relators and their alleged parents voluntarily submitted to blood grouping tests which were taken by the United States Public Health Service experts and certificates concerning the results of such tests were offered into evidence. A second series of blood tests were also taken and the corrected certificates showing the result of the second tests were also offered in evidence. By reason of the corrections made in the second tests, a recheck was also made and it was found that the second tests were accurate in all respects. The result of the blood grouping tests was such that the relationship of two of the relators to their alleged father were conclusive as to non-paternity. Since such tests resulted in an unfavorable result to the relators, the initial exclusion hearings were adjourned and the relators and their attorney were advised that they may make independent blood tests through technicians or experts of their own choice under the supervision of the United States Public Health Service. However, on September 18, 1952, the attorney for the relators, on the record, expressly withdrew his request to have independent blood tests made and presented to the Board for consideration.

(13)

5. The relators appealed to the Board of Immigration Appeals from the decision of the Board of Special Inquiry which ordered their exclusion. On May 11, 1953, the

Board of Immigration Appeals dismissed the appeal and affirmed the decision of the Board of Special Inquiry. In reaching its conclusion, the Board of Immigration Appeals relied, in part, on its own precedent decision in the case of *Lee Fay Fan* dated February 25, 1953, a copy of which has been attached to the administrative record and made a part thereof.

6. After the order for the relators' exclusion became final by the dismissal of their administrative appeal, arrangements were commenced to return the relators to the custody of the transportation line which brought them to the United States for return to the country whence they came. Such arrangements were interrupted by the allowance of the instant writ of habeas corpus at a time when the relators' departure was imminent.

7. For many years wide-spread frauds have existed in attempting to bring children into the United States from China as the claimed issue of American citizens. Since birth and marriage records are almost unknown in China, the claimed relationship has depended in almost every case upon the credibility of the alleged parent and the application for admission. However, even extensive examination of such persons has frequently failed to uncover a suspected fraud, since it is known that detailed advance coaching as to every conceivable matter concerning which such persons can be examined has preceded their applications for admission. This problem has only recently been (14) extensively dealt with in a decision in the United States District Court in California in the case of *Mar Gong* v. *McGranery*, December 15, 1952, 109 F. Supp. 821. Since the alleged identity and relationship of such applicants for admission to the United States has,

in the past, depended almost entirely upon the credibility of the applicants and their alleged parent, and since such testimony is known to have been carefully planned in advance, the Immigration Authorities have been for some time now requesting that the subjects submit to blood grouping tests, not only as evidence of their good faith in claiming relationship, but as the only scientifically established means of developing tangible evidence of non-paternity. While it is true that such blood grouping tests have been requested principally in Chinese cases, these relators have not been singled out for unusual treatment since such tests are uniformly now requested of all applicants for admission who are similarly situated, without documentary evidence of any kind and whose right to admission to the United States is dependent upon a claimed relationship which could otherwise be established only by oral testimony. Moreover, the relators herein and their parents voluntarily submitted to the blood tests and cannot now object to the use thereof because the results were adverse to their claim.

8. The authority and power to determine the admissibility of all persons arriving in the United States was vested by statute in Boards of Special Inquiry of the Immigration and Naturalization Service. (See 8 United States Code, 152 and 153, which were in effect until December 24, 1952. These statutes have been preserved in full force (15) and effect as to all proceedings then pending by Section 405(a) of the Immigration and Nationality Act.) The fact that a person arriving in the United States claims to be a citizen thereof does not divest the Board of Special Inquiry of its power to determine whether such person is an alien and whether it accordingly has jurisdiction to determine admissibility. (*United*

States, ex rel Lapides v. *Watkins*, 165 F. 2nd 1017.) In addition, the determination of a Board of Special Inquiry as to the alleged citizenship of an applicant for admission to the United States, unless reversed on administrative appeal, is final and conclusive. This court is without jurisdiction to accord relators herein a hearing, *de novo*, on the issue of their alleged citizenship. (See *United States, ex rel Medeiros* v. *Watkins*, 166 F. 2nd 897; *United States, ex rel Chu Leung* v. *Shaughnessy*, 176 F. 2nd 249.)

9. With respect to the relators' claim that they would be subject to physical persecution if returned to China, such claim does not in any way affect the validity of the outstanding exclusion order, nor is there any statutory authority for asserting such a claim in an exclusion case. The provisions of Section 243(h) of the Immigration and Nationality Act and the similar provisions of 8 United States Code, 156, as amended by the Internal Security Act of 1950, do not relate to excluded aliens and afford the relators herein no basis for judicial review and intervention. (See *United States, ex rel Camezon* v. *District Director*, 105 F. Supp. 32, 38.)

(16)

10. The question of the relators' possible release on administrative parole or bond is academic inasmuch as the relators are being detained for actual deportation under an exclusion order, execution of which might by this time have been completed except for the intervention of the instant writ of habeas corpus. Moreover, an excluded alien may not seek release on bond since no similar provision is made for excluded aliens as exists in the statutes relating to resident aliens who are sought to be de-

ported from the United States. The present Statute, Section 212(d)(5) of the Immigration and Nationality Act, permits the parole of excluded aliens only for emergent reasons or reasons deemed strictly in the public interest. Prior to December 24, 1952, the effective date of the new Act, no provision for the release of excluded aliens on bail was contained in the statute. (See *United States, ex rel Chu Leung* v. *Shaughnessy*, 88 F. Supp. 91; see also *United States, ex rel Mezei* v. *Shaughnessy*, 345 U. S. 206).

11. The relators, being applicants for admission to the United States, who have been excluded as inadmissible aliens, may not assert any denial of inherent Constitutional rights with reference to the administrative exclusion procedure. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." (*U. S. ex rel Knauff* v. *Watkins*, 338 U. S. 537, 544.) Accordingly, in the absence of any statute precluding the use of blood tests where an (17) issue of paternity is involved, relators cannot claim a denial of due process of law or a fair hearing by reason of the use of such evidence in determining their admissibility. Moreover, as stated in the case of *O'Connell ex rel Kwong Han Foo* v. *Ward*, 126 F. 2d 615, 619, "Being an administrative tribunal, the Board is not bound by the rules of evidence applicable to trial by jury. It is bound only by reason, logic and common sense." In reaching its conclusion in the latter case, the Court of Appeals relied to a large degree on the leading decision of the United States Supreme Court in the case of *Tisi* v. *Tod*, 264 U. S. 131, wherein the Court stated at page 133:

"We do not discuss the evidence; because the cor-

rectness of the judgment of the lower court is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct, or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found • • •. The denial of a fair hearing is not established by proving merely that the decision was wrong • • •. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence."

12. The failure of the Board of Special Inquiry to produce the medical experts who took the blood tests of the relators for cross-examination was not error, nor was it error to receive the certificates showing the result of such tests rather than the oral testimony of the officials of the Public Health Service. In the leading case of *U. S. ex rel Johnson* v. *Watkins*, 170 F. 2d 1009, (reversed on grounds not pertinent here, 336 U. S. 806) at page 1013, the United States Court of Appeals for the Second Circuit stated that a medical report, "though hearsay, was properly incorporated in the record and con- (18) sidered • • •. The alien was given an opportunity to correct it • • • by the testimony of her own expert medical witness • • •."

More recently, the same Court, in the case of *U. S. ex rel Saclarides* v. *Shaughnessy*, 180 F. 2d 687, 688, referred to its decision in the *Johnson* case, supra, stating:

"Though that decision was reversed on other grounds, the Supreme Court expressly agreed as

to the conclusiveness of the medical certificate in the hearing before the Board of Special Inquiry."

The Court further stated at page 689:

"There is, however, nothing in this record to show that the medical examiners were not so qualified and, absent that, they as public officials will be presumed to have had the power to do the official acts they performed."

In addition, the relators cannot claim to have been prejudiced by the receipt of certificates showing the result of their blood tests inasmuch as they specifically requested an opportunity to have independent tests made in their own behalf. Such application was granted upon the reasonable condition that such independent tests be made under the supervision of the Public Health Service, and the relators thereafter withdrew their requests and declined to submit evidence upon that issue. Having failed to avail themselves of the opportunity to present evidence in their own behalf, they cannot now be heard to complain that the hearing accorded them was unfair.

WHEREFORE, it is respectfully prayed that the writ of habeas corpus herein be dismissed and the relators re-
(19) manded to the custody of the respondent.

Dated: New York, N. Y., July 22, 1953.

LESTER FRIEDMAN

(20)

[SAME TITLE]

Petitioner, Lee Ha, by his attorneys, Hong & Gim (Benny Gim, Of Counsel), for his traverse to the return to his petition for a writ of habeas corpus, respectfully shows and alleges:

1. Realleges and incorporates herein each and every allegation contained in his petition verified on the 14th day of July, 1953; alleges further that upon information and belief that the present policy of the Immigration Service is to require blood tests of only Chinese applicants for admission into this country as children of citizens, while imposing no such requirement of applicants similarly situated from other races; and that the existence of this discriminatory policy is confirmed by a letter written by the Surgeon General of the United States to the Public Health Service at Stapleton, Staten Island, in the early part of 1952, which in substance states that the consular authorities in Hong Kong request that parents of applicants for admission be required to submit to blood tests and that such tests are to be administered to Chinese persons only; that further information concerning this letter can be obtained by requiring Dr. Cameron of the Public Health Service at Stapleton, Staten Island, to testify with respect to his knowledge of this letter.

(21)

2. Petitioner denies categorically the allegation contained in paragraph four of respondent's return that "In

the course of the exclusion hearings, the relators and their alleged parents voluntarily submitted to blood grouping tests". In truth and in fact, as stated more fully in the affidavit of Lee Ha and Tew Hee Wong, herein attached and made a part hereof, the relators and their parents *were ordered* by Examining Officer L. C. Joseph to submit to blood tests on or about the latter part of July, 1952. It is significant that the contention of the respondent that these tests were "voluntarily" submitted to is not supported by any statements in the record, but on the contrary on page 42 of Officer Joseph's examination there is the rather ominous notation "CASE DEFERRED FOR BLOOD TYPING." It is also important that the blood tests were ordered at the preliminary inspection—prior to a time—when the relators and their parents had an opportunity to employ and seek advice of counsel.

3. The rather laborious attempts on the part of the Immigration Service to justify the blood test requirement on the premise that they were "voluntary" underscores a rather painful self-consciousness on the part of the government that these blood test requirements have not been authorized either by statute or regulation. Neither 8 U. S. C. A. Sec. 152, nor 8 U. S. C. A. Sec. 153, cited by respondent contain any provision which could by any stretch of the imagination be construed to authorize the taking of blood tests for the purposes of disproving paternity. Section 152 provides for the physical examination by the public health authorities "of all arriving aliens" for the purpose of uncovering "any and all physical and mental defects or diseases"; and plainly does not authorize a blood test not connected with any purposes of revealing physical or mental diseases or defects. Moreover, the section is confined to "arriving aliens", and even

if it could be (22) argued that the relators could be treated as "arriving aliens" until they proved their citizenship, there can be no justification for taking blood samples from their mother, Tew Hee Wong, *a resident* alien, and their father, Lee Ha, a citizen of the United States. The Immigration Service clearly has no jurisdiction over a citizen (*Ng Fung Ho* v. *White*, 259 U. S. 276; *U. S. ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149).

Section 153, in pertinent part, similarly confines actions of the Board of Special Inquiry in exclusion cases based on medical certificates to loathesome diseases and other physical or mental defects.

4. Respondent claims in paragraph eleven that "in the absence of any statute precluding the use of blood tests" relators cannot claim a denial of due process of law or a fair hearing. This contention, however, overlooks the basic legal principle that an administrative agency, such as the Immigration Service, has no inherent power, but may only take such actions as are authorized by the statutes creating it. As stated in *Stark* v. *Wickard*, 321 U. S. 288, 309:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."

See also *Jeager* v. *Simrany*, 180 F. (2d) 650 (9th Cir 1950), and *U. S. ex rel. Cook* v. *Karnuth*, 24 F. 2d 649, reversed on other grounds, 279 U. S. 231, where it was held that the Commissioner of Immigration could not make regulations beyond powers delegated to him.

Moreover, the taking of blood samples as well as other aspects of physical examinations without clear authority in law is a serious invasison of a person's substantive rights, as was demonstrated in the case of *Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250. There, the Supreme Court in (23) holding that a United States Court could not order a plaintiff to submit to a physical examination before trial, said:

> "No right is held more sacred, or is more carefully guarded, by common law, than the right of every individual to the possession and control of his own person, free from all restraints or interference of others, unless by *clear and unquestionable authority in law.*" (emphasis added)

Further, it was pointed out in *Ross & Co.* v. *Galloway*, 114 P. 2d 550, that even where a court is authorized by law to order plaintiff to submit to a physical examination, the authority cannot be extended to require a plaintiff, under the guise of a physical examination, to furnish samples of plaintiff's bodily components to be used for purposes of chemical analyses.

5. In paragraph four of the return, respondent states that with respect to the blood grouping tests, "a recheck" was made and that "it was found that the second tests were accurate in all respects". This allegation is absolutely unsupported by the record. On the contrary, the record on the Board of Special Inquiry hearings on page 20, finding 10, indicates expressly that only two—not three as implied by respondent—tests were made. As indicated in the record, these tests conflicted as to three of the five persons examined, and excluded all three relators as children of the parents on the first test, but were

"changed" on the second test to exclude but two of the relators. The respondent also refers to these unsworn blood test reports made by unidentified individuals of unknown qualifications as "certificates", and thereby implying that they were made by either doctors or experts. This also is unsupported by the record. The Board Chairman (R. 7, 8,) specifically states that these tests were "reports", but respondent has by some deft strokes of a typewriter promoted these "reports" to the status of "certificates."

(24)

6. Respondent in paragraph twelve of the return contends that the failure of the Board of Special Inquiry to produce the "medical experts" who took the blood tests for cross-examination, after timely request by counsel, was not error, and citing *U. S. ex rel. Seclarides* v. *Shaughnessy*, 180 F. 2d 687, 688, claims that there is nothing in the record to show that the "medical examiners" making the "medical certificates" were unqualified.

As pointed out above in paragraph five these blood test reports which were only initialed, not signed, by unidentified individuals were not "medical certificates", nor is there any indication in the record or the reports themselves that they were made by doctors. Moreover, since blood tests are highly susceptible to error, not even a doctor is necessarily qualified to make such tests. In the book, "Disputed Paternity Proceedings," published in 1947, by Sidney Schatkin, the author points out on page 334 that:

> "Anyone familiar with the sciences of genetics and serology as applied to disputed paternity cases knows *how few in number are the physicians in the*

> *entire country truly competent* to carry out a complet forensic blood-grouping. Even in Germany, for example, where the courts have had the most extensive experience with the test, it has been authoritatively observed that there are not more than a dozen specialists actually qualified to conduct a reliable blood test. *It is a conservative statement* that such number is not very much exceeded in the United States, and *in all probability, there are not more than fifteen competent* and *qualified pathologists.*" (emphasis added)

The courts recognize the importance of producing the expert for an examination of his qualifications to conduct blood tests in paternity cases. Thus, in *Commissioner of Welfare* v. *Cortonie*, 97 N. Y. S. 2d 804, the Appellate Division held that in a paternity suit, where all that the trial court had before it were the filed *unsworn blood test reports,* excluding the defendant's paternity, and the trial court was afforded no grounds for judgment as to the methods adopted, (25) precautions taken to insure an accurate result and scientific basis for the tests, and where *the doctors* who made the tests *were not called as witnesses,* the case would be reversed and a new trial ordered.

In this respect, it should be noted in passing, that the Public Health Service "experts" who conduct blood tests have by no means established an enviable record for accuracy in such matters. Thus in recent months, counsel has heard of several cases where errors in blood tests by the Public Health Service have been made. In Gong Check Mee (NY 0300/423164, BIA, October 16, 1952), Dea Jung Yip (NY 0300/422470), Lee Tew Fung (NY 0300/424070); Lum Kwock On (San Francisco case);

Lee Soo Yiu (NY 0300–422307), the Public Health Service concluded that the claimed paternity could not exist on the basis of blood tests. In each of these cases, the tragedy of having citizens excluded from their country was averted by re-taking these tests by qualified experts brought in from the outside.

7. In paragraph seven of the return, respondent claims that "While it is true that such blood grouping tests have been requested principally in Chinese cases," the relators have not been singled out for unusual treatment since such tests are now required of all applicants for admission who do not have birth certificates or other documentary evidence of their identity. In other words, respondent implies that the reason Chinese applicants are required to submit to blood test is because they do not possess birth certificates or other documentary evidence of their identity, but depend upon oral testimony to establish such proof. If this allegation is correct then it follows that those Chinese persons who were either born in Hong Kong or large westernized cities in China, where birth records are kept, and who are able to produce such documentary evidence would not be required to take the blood test. But, as will be demonstrated, this is not true.

(26) Chinese applicants, *regardless of whether they have birth certificates or other documentary evidence of their identity*, are uniformly required to take blood tests, although no such requirement is imposed on applicants similarly situated from other races. This was shown in the cases of Goon Hew Man (VP 3 8296) child of Goon Lun Poy, and Lee Soo Yiu (NY 0300-422307) daughter of Lee Wah Ying, a citizen of the United States. In the Goon Hew Man case, a Hong Kong birth certificate was

produced, as well as other proof, but still a blood test was required by the authorities. In the Lee Soo Yiu case, a birth certificate signed by the doctor who delivered her at a large hospital in Canton, China was produced, as well as other documentary evidence. Nevertheless, the Immigration Service, because she was Chinese, required the applicant to submit to blood tests by the Public Health Service, and also required her parents to take blood tests. It should be noted parenthetically that the Public Health Service, as in many other cases, made a mistake here in blood typing and almost precipitated a double tragedy. The Public Health Service concluded Lee Soo Yiu could not be the daughter claimed. The distraught father then being convinced that his wife had committed adultery, left her to commence divorce proceedings, and the Immigration Service was about to exclude the daughter from entry into the United States. Counsel for the parties, however, brought in an outside expert who proved that the Public Health Service made an error in the blood tests, and the child was subsequently admitted as a citizen, and the family was re-united.

8. Respondent in paragraph eleven and paragraph eight of the return propounds the rather frightening doctrine that because the Immigration Service has treated the relators as (27) entrant aliens, and has determined that they are not citizens, they are not entitled to due process of law and there is consequently no appeal from any decision of the Immigration Service, regardless of whether such decision was capricious, arbitrary, unfair or unreasonable. The government cited *U. S. ex rel Knauff* v. *Watkins*, 338 U. S. 537, 544, as authority for this contention. In the Knauff case, the relator was excluded pursuant to a specific statute of Congress which provided

that where an alien is excluded on grounds involving national security, no hearing need be had where the disclosure of such grounds would be prejudicial to the national interest. In this case, a hearing was had before the Board of Special Inquiry pursuant to another statute, 8 U. S. C. 153, and the exclusion had nothing to do with any grounds involving national security, and therefore the Knauff case is not applicable to the situation involving the relators. There is a long line of cases dating as far back as fifty years which hold that in an exclusion case resulting from an adverse determination of the Immigration Service, an appeal may always be had to the courts where the determination by the Service was without due process of law, or was arbitrary, capricious or unreasonable. (The *Japanese Immigrant Case*, 189 U. S. 86; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Chin Yow* v. *U. S.*, 208 U. S. 8; *Chun Kock Quon* v. *Proctor*, 92 F. 2d 326;) In the Kwock Jan Fat case, the Supreme Court of the United States said:

> "The acts of Congress give great power to the Secretary of Labor over Chinese Immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race.
>
> It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

Moreover, the Knauff case cited by the respondent has (28) been seriously weakened by what the Supreme Court, in sustaining the writ of habeas corpus, said in the case of *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 600 (1953):

> "From a constitutional point of view, he is entitled to due process *without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien,* * * *" (emphasis added)

Further, there is even authority for the proposition that regardless of whether or not the decision of the Immigration Service was arbitrary, capricious, or without due process of law, a de novo hearing can always be had in court from an adverse determination of citizenship. *Cheu Leung* v. *Shaughnessy*, 176 F. 2d 249, is to the contrary, but that case was based primarily on the fact that under section 503 of the Nationality Act of 1940 (54 Stat. 1137), the relator, could by a declaratory judgment, instead of by habeas corpus, seek a de novo hearing on his issue of citizenship.

Under the Immigration and Nationality Act of 1952, however, the views enunciated in the Cheu Leung case can no longer be justified, because the 1952 Act forbids one from obtaining a declaratory judgment on the issue of his citizenship where such issue arose from an exclusion proceeding, and as stated in 66 Harvard Law Review, page 674:

> "Unless there is to be a judicial trial de novo on the issue of citizenship in habeas corpus proceedings, the 1952 modification of the declaratory procedure seem unjust; the fact of citizenship is so basic to one's life that where his citizenship is challenged, he ought in the determination of that

question to have the guarantees of fairness contained in the judicial process."

9. In paragraph seven of the return, respondent claims that "wide-spread frauds have existed in attempting to bring children into the United States from China" and that "even extensive examination of such persons has frequently failed to uncover a suspected fraud, since it is known that detailed advance coaching" precedes their applications for admission. Of course, respondent does not claim expressly that there is any evidence of fraud in this case, and indeed there is nothing in the records of the Immigration Service to support this (29) claim. But, however, an inference is intended by the respondent that the consistent testimony of the relators and their parents is possibly due to some "advance coaching". This inference however overlooks some important facts in this case which negate such a possibility. It must be remembered that two of the relators, Lee Kum Cherk, and Lee Moon Wah, are only fourteen and thirteen years of age, respectively, that their father, Lee Ha, has been in the United States since 1939, and that their mother, Tew Hee Wong has been away from the children since 1948, and further, that the testimony of these two relators, as well as Lee Kum Hoy, agreed closely with the testimony of the parents, and this was conceded by the Immigration Service. It is obvious the father Lee Ha could not possibly have "coached" his two younger children to testify consistently with whatever he might testify to, since he has been in this country since 1939. The mother left these children when they were nine and eight years of age, respectively, and it is incredible that children of such tender ages then could be "coached" by her to testify consistently with her statements, and then

to have these two children remember "the coaching" for a period of five years. Moreover, no matter how detailed any "coaching" might be, if this be the case, how could anyone have anticipated the minute and precise types of questions that were asked as indicated in the record. Just to take on example, each of the children and the mother were asked what time of day she left from China for the United States, and which of the three children accompanied her to the nearby village to begin her journey. The testimony agreed on this point, and the only plausible explanation is that the children actually lived with their parents and were in fact the children claimed, and they were actually at home in 1948 when their mother left for the United States.

10 The Immigration Service has always been overly suspicious with respect to Chinese applicants and this fact has come to the attention of the courts, which have on frequent (30) occasions found such suspicions to be unwarranted and unjustified. The case of *U. S. ex rel. Ng Fon Yuen* v. *Reimer*, 29 F. Supp. 976 (D. C. S. D. N. Y.) is very sismilar to the case at bar since in the Ng case, the immigration records with reference to the father with respect to his return to China for the purposes of getting married, the birth of a son, the father's return to the United States, and the subsequent admission of his wife were consistent with both the testimony of the father and the son at the time of the immigration hearings. In the case at bar, the records relating to relators' father, Lee Ha, date back to 1926, when he was admitted to the United States as a citizen, and include his trips to China in 1929-1930, and 1938-1939; the admission of his son in 1939, and the admission of his wife in 1949, and on all these occasions statements taken from him con-

sistently indicate that he married Tew Hoe Wong prior to 1926; that he had five children by her, including the three in this case, and these statements were consistent with the testimony given before the Board of Special Inquiry. In the Ng Fon Yuen case, Judge Conger said:

> "* * * There are few if any discrepancies in the stories. None were pointed out by the Board of Special Inquiry. If true and correct, there can be no question as to the paternity of the relator.
>
> It has been urged upon me, however that these stories are prepared and that the testimony is 'coached testimony'. This may very well be, although there is nothing in the record which sustains the contention, but there is evidence in the files of the Department of Labor commencing in the year 1923 which adds great weight to the claim of the applicant * * *

and on page 977, he said:

> "While these records and these findings of the authorities may not be considered res adjudicata, yet they have great probative force. *It is not within the bounds of reason that this testimony commencing back in 1923 and repeated at several intervals down to 1931 was made of whole cloth,* and particularly with reference to the paternity of the applicant, which testimony concededly was given at a time when this question was not involved in the issue, and was not material, necessary or relevant." (emphasis added)

(31) See also: *U. S. ex rel Lee Kim Toy* v. *Day,* 45 F. 2d 206 where Judge Knox said: "The applicant claims

to be this Lee Shew Hong. It would be pushing beyond the bounds of reason to suppose that Lee Kim Toy [the father] in 1915 concocted a story of a fictitious son for use fifteen or more years later."

And in *Johnson* v. *Ng Ling Fong,* 17 F. 2d 11 (CCA 1st 1927) the government "entertained a suspicion that the applicant's testimony was a 'prepared story', although the Board of Review states that there is no proof that it was * * *". In holding such suspicion unjustified, the Circuit Court said:

> "The records in the Immigration Department concerning the alleged father and his family since 1909 are so complete, and the statements as to the number and births of his children have been so consistent, through this long period of time, that it is inconceivable that fair-minded men, free from bias and suspicion should entertain any reasonable doubt as to the relationship of the applicant and the alleged father."

These and other cases demonstrate that the suspicious attitude of the Immigration Service toward Chinese applicants has led in many cases to unjustified exclusions, discriminatory procedures toward Chinese persons, and overreaching of authority in imposing unconstitutional conditions upon persons of Chinese ancestry who attempt to claim their birthright of citizenship. If, indeed there is any problem with respect to fraudulent cases, then it is for Congress, not the Immigration Service, to remedy the problem openly and above-board by appropriate legislation with adequate safeguards for the individual rights (*Gegiow* v. *Uhl* 239 U. S. 3).

WHEREFORE, it is respectfully prayed that the writ of habeas corpus be sustained; that the relators, two of

whom are children of tender years be released on bail from their year-long confinement, pending the decision on the writ, and for such other relief as may in the premises be proper.

BENNY GIM

(Verified July 27, 1953.)

Affidavit of Lee Ha and Wong Tew Hee (Tew Hee Wong)

(32)

[SAME TITLE]

State of New York,
County of New York—ss.:

LEE HA and WONG TEW HEE (TEW HEE WONG), being parents of the above relators, both having been duly sworn, depose and say:

1. That on or about July 17, 1952, they appeared before Immigration Officer L. C. Joseph for the purpose of giving testimony concerning the application for admission as citizens, the above-named children.

2. That at the conclusion of the hearings, Mr. Joseph told them that both they and the children would be required to take blood tests; that your deponent Lee Ha, specifically asked Mr. Joseph why that was necessary, and Officer Joseph said that your deponents as well as their children would have to submit to blood tests if the

children are to be admitted into this country, and that otherwise, they would be returned to China.

3. That neither of your deponents nor any of their children voluntarily consented to have blood tests taken, but that we submitted thereto because of the statements made to us by Examining Officer Joseph which indicated that the blood tests were legally required in all cases involving admission of children into this country as citizens,

(33)

4. That at no time did the immigration authorities advise us to the effect that the blood tests were voluntary, and that these tests were taken before we had an opportunity to employ a lawyer to advise us of our rights.

s/ LEE HA
Lee Ha

s/ WONG TEW HEE
Wong Tew Hee

(Sworn to July 27, 1953.)

Opinion Filed September 17, 1953, Conditionally Sustaining Writ

(34)

=115

[SAME TITLE]

APPEARANCES:

HONG & GIM, Esqs.,
Attorneys for Relators
551 Fifth Avenue
New York 17, N. Y.

Benny Gim, Esq.,
Of Counsel.

HONORABLE J. EDWARD LUMBARD
United States Attorney for the
Southern District of New York
Attorney for Respondent

Harold R. Tyler, Jr., Esq.,
Assistant United States Attorney,

Max Blau, Esq.,
Attorney, Immigration and Naturalization Service,

Of Counsel.

(35)

OPINION

DIMOCK, *D. J.*

The three relators in this habeas corpus proceeding are natives of China who claim United States citizenship by

they allege to be their father. They have been excluded from entry on the ground that this relationship has not been proved. They raise, among others, the point that they were denied due process in the introduction and use of reports of blood grouping tests in the proceedings resulting in their exclusion. The reports upon which the Board of Special Inquiry acted in excluding relators and upon which the Board of Immigration Appeals acted in dismissing their appeal were said by those authorities to demonstrate that appellants Lee Kum Hoy and Lee Mon Wah could not have been the children of their alleged father Lee Ha and his wife, Wong Tew Hee.* The ground which the authorities took as to the third relator, Lee Kum Cherk, was that, by testifying that the others were his brother and sister, he had forfeited any right to have his story as to his own paternity believed.

The alleged parents and the three relators testified to their relationship before the Board of Special Inquiry and that Board made a formal finding that the testimony of all five had been reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service. Nevertheless the Board (36) held the relators inadmissible on the basis of the blood grouping test reports which were said to exclude the possibility of the claimed parentage of two of them and to impeach the credibility of the third.

The Board of Immigration Appeals in a careful opinion cited a prior declaration that it would consider the results of blood grouping tests as conclusive if the tests had been properly conducted and that a showing of incompatability

* Also variously referred to in the proceedings as Tew Hee Wong and Hee Tew Wong.

Opinion Filed September 17, 1953,
Conditionally Sustaining Writ

of blood type conclusively established non-paternity. The Board therefore dismissed relators' appeal.

I am thus presented with a case where everything but the reports of blood grouping tests of two of the relators indicates that they are the children of an identified American citizen and his wife but where the reports have been given conclusive effect to the contrary.

To begin with I must ascertain whether or not relators may raise in this habeas corpus proceeding the question whether they were accorded due process in the proceedings leading up to their exclusion.

Relators say that they are not only entitled to due process in these habeas corpus proceedings but are entitled to a judicial determination as to their citizenship in them. Relators would be clearly right if the administrative proceedings had been for deportation rather than exclusion. *Kessler* v. *Strecker*, 307 U. S. 22, 35. As to exclusion proceedings, however, it was held in *United States ex rel. Chu Leung* v. *Shaughnessy*, 2 Cir., 176 F. 2d 249, (37) that the excluded alien was limited in habeas corpus to review of the fairness of the hearing and the correctness of the rules of law applied. Relators point out that the Court of Appeals in that case justified the denial of the right to a judicial determination of citizenship in habeas corpus on the ground that a separate special proceeding was available for that purpose. Relators say that the Immigration and Nationality Act of 1952 has withheld that proceeding from them and that the ground has thus been cut from under the holding that persons in their situation may not have a judicial determination of citizenship in habeas corpus.

I need not, however, decide that point. Relators were given a hearing pursuant to 8 U. S. C. §153 and, under

the authority of *Kwock Jan Fat* v. *White*, 253 U. S. 454, were entitled to due process of law. Under the circumstances of this case relators were not accorded that protection.

Lee Ha, the alleged father, was admitted to this country in 1926 as the son of a native born citizen. He had married Wong Tew Hee, his present wife, prior to leaving China. He claims that one son was born to them before he came to this country. The son is said to have gone into the Chinese army and not to have been heard from in thirteen years. The alleged father returned to China in 1929. He says that twin sons were born to his wife on September 8, 1930, and that one of these is the relator Lee Kum Hoy and the other is named Lee Kum Ark. The alleged father returned to this country in 1930 after the birth of the twin sons but went back to China, leaving the United States on June 25, 1938. He says (38) that a son, relator Lee Kum Cherk, was born to his wife on May 19, 1939, and that a daughter, relator Lee Moon Wah, was born to her on June 20, 1940. The alleged father had returned to the United States after the birth of Lee Kum Cherk, arriving on October 30, 1939, and bringing with him one of the twin sons, Lee Kum Ark. In 1949 the alleged mother, Wong Tew Hee, came to this country. All of the immigration records made at the times of these various entries and departures are consistent with the family history as above recited.

The relators, two boys and a girl, aged respectively twenty-one, thirteen and twelve, arrived in New York by air on June 17, 1952. They and their alleged parents were examined before the Board of Special Inquiry with great particularity as to their village in China, their dwelling house, various family celebrations, their neigh-

bors, their relations and even the hour of the day that their mother left in 1949, and who accompanied her to catch the bus. The answers of all were substantially consistent and gave no indication that they were the result of coaching.

The examination was adjourned for the purpose of taking blood grouping tests.

Upon resumption, the Government marked in evidence two sets of five cards each. The cards were Standard Form 514b, promulgated 1948 in the case of three of the cards and revised 1951 in the case of the rest. Each bore the designation "Hematology". The cards bearing the names of the three relators in the first set were signed with an indecipherable monogram which looks like D. S. and all the (39) rest of the cards in both sets were signed with another indecipherable monogram which looks like N. Y. In each case the signatures were over a line under which was printed "(Report Made By —— Initials.)" In the first set the cards bearing the names of the relators had no notation on a line subscribed "Name of Hospital or Other Medical Facility" but all the rest in both sets bore in this space the words "U. S. Public Health Service Hospital, Staten Island 4, N. Y."

The forms were divided into two colums, respectively headed "Check Exam. Requested" and "Results". The lines designated "Blood Type" and "Rh Factor" on the 1948 form and "Blood Group" and "Rh Type" on the 1951 form were checked on some of the cards and there were notations on all of the lines so designated under the word "Results". On the cards of the three relators in the first set there were additional notations on a line with no designation and placed below the line designated "Rh Factor".

Opinion Filed September 17, 1953.
Conditionally Sustaining Writ

In tabular form the information was as follows:

(40)

FIRST SET

Name	Date of Report	Ck. Exam. Reqtd.	Results	Signature
Lee Kum Hoy	7/ 1 52	Blood Type Rh Factor [Undesignated line]	B + MN	D.S. [?]
Lee Kum Cherk	7/ 1/52	Blood Type Rh Factor [Undesignated line]	O + N	D.S. [?]
Lee Moon Wah	7/ 1 52	Blood Type Rh Factor [Undesignated line]	B + MN	D.S. [?]
Lee Ha	7/18/52	Blood Group Rh Type [Undesignated line	A +M [none]	N.Y. [?]
Wong Tew Hee	7/18/52	Blood Group Rh Type [Undesignated line]	A +M [none]	N.Y. [?]

SECOND SET

Lee Kum Hoy	8/12/52	Blood Group Rh Type [Undesignated line]	B +M [none]	N.Y. [?]
Lee Kum Cherk	8/12/52	Blood Group Rh Type [Undesignated line]	O +N [none]	N.Y. [?]
Lee Moon Wah	8/12/52	Blood Group Rh Type [Undesignated line]	B* +MN [none]	N.Y. [?]
Lee Ha	8/14/52	Blood Group Rh Type [Undesignated line]	A MN [none]	N.Y. [?]
Wong Tew Hee	8/14/52	Blood Group Rh Type [Undesignated line]	A MN [none]	N.Y. [?]

* Followed by an indecipherable sign which may have been inadvertent.

Opinion Filed September 17, 1953,
Conditionally Sustaining Writ

(41)

The examining inspector summarized the reports as follows:

First Set

Lee Kum Hoy	Blood Type	B		Rh Factor	+	MN
Lee Kum Cherk	"	"	O	"	"	+	N
Lee Moon Wah	"	"	B	"	"	+	MN
Lee Ha	Blood Group	A		Rh Type	+	M
Wong Tew Hee	"	"	A	"	"	+	M

Second Set

Lee Kum Hoy	Blood Group	B		Rh Type	+	M
Lee Kum Cherk	"	"	O	"	"	+	N
Lee Moon Wah	"	"	B	"	"	+	MN
Lee Ha.	"	"	A	"	"		MN
Wong Tew Hee	"	"	A	"	"		MN

Counsel for relators objected to the introduction of the reports in evidence.

The examining inspector announced to Wong Tew Hee, who was under examination at that particular time, that, according to the "A-B" test in both sets of reports, she and Lee Ha could not possibly be the parents of relators Lee Kum Hoy and Lee Moon Wah.

The examining inspector also put in evidence, among other things, a pamphlet copy of an article by Alexander S. Wiener, M.D., in the United States Law Review for December, 1936, which contained, among other things, a table indicating the impossibility of parents, each belonging to Blood Group A, having children belonging to Blood Group B, and a table indicating the impossibility

of parents, (42) each belonging to Blood Type M, having a child belonging to Blood Type N.

Counsel for relators excepted to the admission of the article in evidence and asked for the presence of Dr. Wiener and the doctor who made the blood tests for examination. His exception and request were rejected.

The examining inspector offered to permit counsel for relators to make an independent blood test by a doctor retained in behalf of the applicants "under the supervision of the United States Health Service with prior notice to the Immigration Service".

Counsel later withdrew his "request for an independent blood test" because he came to the conclusion that he should first cross-examine Dr. Wiener. At the time of the withdrawal, in response to a question by the examining inspector, relators said that no additional blood tests had been taken.

Dr. Wiener, in his article which was used by the examining inspector in evaluating the results of the tests, had occasion to discuss the claim that changes in the blood groups of an individual can occur. He said:

> "The explanation of these observations is that they resulted from technical errors occurring when the tests were performed. Not one of these reports was written by an experienced investigator or by a recognized authority in the field. They are mentioned here only because they serve to emphasize that errors in technique can occur unless the tests are performed by a properly qualified individual. The tests for M and N are particularly of a delicate nature, so that considerable experi- (43) ence is necessary before one should be permitted to do

the tests in medicolegal cases; otherwise, errors may result which may serve to discredit the work or even cause a miscarriage of justice."

Relators' counsel in his excellent brief cites a report by the Committee on Medicolegal Problems of the Bureau of Legal Medicine and Legislation of the American Medical Association on Medicolegal Application of Blood Grouping Tests. 149 Journal of A. M. A. 699, June 14, 1922. Dr. Wiener was one of three members of that Committee.

With respect to the conclusiveness of the tests upon a court proceeding the committee says:

"While the results of the blood tests are admissible when they exclude paternity, the findings are not binding on the court. That is as it should be. It is the duty of the court to examine the evidence in order to convince itself that the tests have been properly carried out by qualified experts. When the court feels that adequate safeguards have not surrounded the tests, it should order the tests to be repeated by an independent expert, and there is nothing to prevent shipping of the blood to another part of the country if there is no other qualified expert in the state in which the case is being tried. In divorce and separation actions the court often takes into account other considerations, aside from the scientific results of the blood tests. To base decisions entirely on the results of the blood tests in such cases may harm an innocent third party by bastardizing the child. For this reason in a number of cases the court has refused

to grant a divorce on the basis of the blood tests alone. In uncontested divorce actions, however, when the blood tests exclude paternity, the court has no choice but to grant the decree."

The Committee has this to say about the qualifications of experts:

(44)

"It hardly seems necessary to point out that it is essential that the person who undertakes to perform blood tests in medicolegal cases be a specialist in the field, that is, he should preferably be a person with an M.D. degree or with comparable academic training such as the possession of a Ph.D. degree, who has acquired extensive experience in the entire field of study of individual blood differences. In this connection, there is need for formation of a special panel of persons qualified to perform blood grouping tests in medicolegal cases of disputed parentage. In the meantime it is possible to distinguish most of the experts by the quality of their publications on the subject. The expert will have available at all times a large panel of persons of representative blood groups and types from whom he can obtain blood samples to serve as positive and negative controls for the various antibodies employed. The results of the control tests should be included in the final report. It is reprehensible to accept a case of dispated paternity and then purchase the necessary testing serums in order to obtain one's first experience with the delicate M-N and Rh-Hr tests with a

problem of this nature. These tests have numerous pitfalls, and accurate results can be obtained only by specialists with regular and continuous experience with these tests. Moreover, the qualified expert must not only be a capable immunologist but also be well versed in genetics.

The policy followed in New York City appears to be sound, and is also the least objectionable, since it does not interfere with the principle of free choice of physicians. After consultation with the New York Academy of Medicine, the Court of Special Sessions drew up a list of qualified experts available in the metropolitan area. When any party to an action requests the blood test, his attorney is permitted to select any physician whose name is included on the list of experts. In addition to this precaution, whenever the blood tests exclude paternity, independent blood tests are carried out by another expert on the list."

The strong words of the Committee are obviously justified. An incorrect determination of non-paternity in this case would not only separate children from their parents but would bastardize legitimate children and unjustifiably tend to shake a husband's (45) trust in his wife's fidelity. The common law, where a child has been born of a women during wedlock, indulges in one of the strongest presumptions known to the law, the presumption that the child is that of her husband. Perhaps an administrative agency can disregard that rule of law without violating due process but it must, at least, give the parties the fullest opportunity to examine the accuracy of blood grouping tests on which a conclusion of non-paternity is based.

Opinion Filed September 17, 1953,
Conditionally Sustaining Writ

That opportunity to test the accuracy of the blood grouping tests was denied relators here and I think that that denial was so serious as to infect the hearing with the degree of unfairness which amounts to a denial of due process of law. In effect, relators were confronted with pieces of paper purporting to give test results and yet were not afforded an opportunity to examine beyond the face of these pieces of paper before they were admitted in evidence. The reports of the blood tests put in evidence do not show who performed the tests. They only contain indecipherable monograms. Not knowing who performed the tests, relators were unable to examine into qualifications of the testers, a matter of considerable importance according to both of the articles referred to above. Likewise, relators had no opportunity to learn what techniques or procedures were employed in these tests which is also of no little importance. More than that they could not determine whether any danger of confusion or substitution of samples or testing serums existed during the handling of the samples and the making of the tests. Nevertheless, the reports were (46) admitted. That is, blood test reports were accepted as evidence against relators although the circumstances by which they came into existence were enshrouded in mystery and then accuracy was clouded in doubt and uncertainty by the inconsistency between the two sets, if by nothing else. Relators were thus put to the task of somehow attempting to explain away evidence of a questionable character prepared for and supplied by the immigration officials. The net effect of this is that the immigration officials can arrange for blood tests and have at their disposal any information they desire concerning these

tests. Yet, without making much more than the mere results available to relators, they can have such results admitted in evidence and leave relators completely in the dark concerning very important circumstances reflecting upon the accuracy of the tests or at best relegate relators to whatever information a diligent investigation might uncover in the short time during the conduct of the hearing. To my mind, it is unfair to admit such evidence under the circumstances and, it being evidence of such importance in this case, its prejudice to relators is plain.

Even had the two reports been consistent with each other and attested by the full signature of a physician skilled in the particular art, I think that due process would still have required that relators have an opportunity to cross-examine him. The reports in this case, however, cry out for cross-examination. Is there a close similarity between the MN and N types which would account for the transposition of those symbols in the first and (47) second tests of three out of five of those tested? Is there a like similarity between the B O or A types which would make such mistakes likely in the "A-B" test? Is there any significance in the entering of the M-N symbols on the Rh line sometimes or is that an inadvertence? Is the omission of the + sign from the Rh line in two instances significant or is that an inadvertence? What, if any, is the significance of the change in terminology from "Blood Type" and "Rh Factor" to "Blood Group" and "Rh Type"? Is there any reason to believe that a third set of tests would not result in a still different conclusion?

Relators were denied due process too in the imposition of the condition that their own tests must be made under

the supervision of the United States Public Health Service. Observation by that Service might be useful in making sure that there was no substitution or confusion of samples but supervision would probably result in tests which would perpetuate the errors, if any, made by the Service in its own tests.

Relators contend that it was also a denial of due process to admit Dr. Wiener's article in evidence without giving relators an opportunity to examine the author. The article was used as the source of the tables on which the examining inspector based his conclusions as to paternity. Relators point out that the article was published in 1936 and that, in 1952, Dr. Wiener, in conjunction with the two other members of the Committee on Medicolegal Problems of the Bureau of Legal Medicine and Legislation of the American Medical Association, published the report on Medicolegal Application (48) of Blood Grouping Tests above referred to, 149 Journal of A.M.A. 699. The report emphasizes the progress that has been made since 1937 and adds, "Certain aspects of the subject are still controversial." While the report does not specifically cast doubt upon the universality of the application of the tables set forth in Dr. Wiener's earlier article, it does reveal that the data used in reaching its conclusions were based upon experience with Caucasoids and Negroids. There are no data in the report as to the reactions of Mongoloids. The report also emphasizes the importance of the Rh-Hr tests about which nothing had been said in the prior article.

By examining Dr. Wiener relators hoped to demonstrate that the examining inspector's conclusions from the blood tests were faulty. They wished to test the validity

Opinion Filed September 17, 1953,
Conditionally Sustaining Writ

for Mongoloids of Dr. Wiener's tables. They could have accomplished these purposes by calling Dr. Wiener on their own behalf after the tables had been introduced.

I cannot say that the introduction of the tables without producing Dr. Wiener for relators' cross-examination constituted a denial of due process. The infallibility of the blood test has been so far accepted that Justice Shientag, in a concurring opinion, said that the exclusion of paternity based on the test should, "assuming the tests to have been competently and accurately made, be accepted as conclusive by the trial court" and the per curiam opinion in the case indicated that the court was ready to take that view if evidence were adduced that it was "a scientifi- (49) cally established and accepted fact that an exclusory finding is conclusive as to nonpaternity." *Commissioner of Welfare of N. Y.* v. *Costonie*, 277 App. Div. 90, 92, 91, 97 N. Y. S. 2d 804, 806, 805. The Supreme Court of Maine has taken the same view as Justice Shientag. *Jordan* v. *Mace*, 144 Me. 351, 69 A. 2d 670.

In the light of this judicial attitude it would be difficult to say that the action of the Board of Inquiry, in making use of the tables, was even erroneous, let alone a deprivation of due process. It was open to relators to present their own evidence as to any infirmity in the tables as applied to them. This they failed to do.

Relators, citing *Quan Hing Sun* v. *White*, 9 Cir., 254 F. 402, as condemning discrimination against Chinese in administering the law relating to the admission of children of citizens, charge that blood grouping tests are used by the Immigration and Nationalization Service only in cases involving Chinese. The Government denies this and says that they are used wherever birth records are not avail-

Opinion Filed September 17, 1953,
Conditionally Sustaining Writ

able. Relators counter with the claim of the existence of a letter from the Surgeon General to the Public Health Service which directs that blood tests be administered only to Chinese persons. I cannot pass upon the question of discrimination without knowing what the facts are. Since the relators must be released unless they are accorded a further hearing before the Board of Special Inquiry, the facts as to the actual (50) practice of the Immigration Service can be developed, if it becomes necessary, upon the new hearing.

Relators make the unqualified statement that those who claim the right to enter as citizens cannot lawfully be required to submit to blood tests. I am not called upon to decide that question since there is here no sufficient evidence that the blood tests were required. Relators and their alleged parents voluntarily submitted and I cannot shut my eyes to the existence of the reports.

The writ will be sustained unless, within 20 days from the date of the order to be entered hereon, the hearing before the Board of Special Inquiry is reopened for proceedings in accordance with this opinion.

Settle order on notice.

Dated: September 17, 1953.

E. J. DIMOCK
United States District Judge

Order Filed October 21, 1953, Conditionally Sustaining Writ

(78)

[SAME TITLE]

A writ of habeas corpus, heretofore issued on July 13, 1953, having come on to be heard before this Court on July 28, 1953, and Messrs. Hong & Gim (Benny Gim, Esq., of counsel), attorneys for relators, having been heard in support of the writ, and J. Edward Lumbard, Esq., United States Attorney for the Southern District of New York (Harold R. Tyler, Jr., Assistant United States Attorney, of counsel), attorney for respondent, having been heard in opposition thereto, and due deliberation having been had, and upon reading and filing the petition for the writ of habeas corpus verified on July 10, 1953 and the return to the writ of habeas corpus dated July 22, 1953, and the Court having, on September 17, 1953, filed its decision dated September 17, 1953; and

A motion for reargument of said writ of habeas corpus having been made by the respondent on September 30, 1953, and due deliberation having been had, and upon the reading and filing of the affidavit of Lester Friedman, Esq., dated September 29, 1953, in support of said motion for reargument and the affidavit of Benny Gim, Esq. dated October 6, 1953, in opposition thereto, and the Court having denied said motion for reargument by its decision dated October 7th, (79) 1953, which was filed on October 9th, 1953;

Now, on motion of J. Edward Lumbard, United States Attorney for the Southern District of New York, attorney for respondent, it is

Order Filed October 21, 1953, Conditionally Sustaining Writ

ORDERED that the writ of habeas corpus be, and hereby is, sustained, unless, within twenty days after the date of this order, the hearing before the Board of Special Inquiry is reopened for the purpose of allowing the relators herein to cross-examine the technicians of the United States Public Health Service who conducted the blood tests of the relators and for such other and further proceedings as are required by the decision of this Court dated September 17, 1953.

Dated: New York, New York,
October 16th, 1953.

E. J. DIMOCK
U. S. D. J.

Unsigned Proposed Order for Dismissal of Writ

(108)

[SAME TITLE]

A Writ of Habeas Corpus having come on to be heard before this Court on July 13, 1953, and Messrs. Hong & Gim (Benny Gim, of Counsel), attorney for the relators, having been heard in support of the Writ, and J. Edward Lumbard, United States Attorney for the Southern District of New York (Harold R. Tylor, Jr., Assistant United States Attorney, of Counsel) attorney for the respondent, having been heard in opposition thereto, and due deliberation having been had, and upon reading and filing the petition for the Writ of Habeas Corpus, veri-

filed on July 10, 1953, the return to the Writ, dated July 22, 1953 and the traverse to the return dated July 27, 1953, and the Court on September 17, 1953, having filed its interim decision of that date, and

An order having been duly signed by this Court on October 16, 1953 and duly filed on October 21, 1953 sustaining the Writ of Habeas Corpus unless within 20 days after the date last mentioned the administrative proceedings before the Board of Special Inquiry were reopened for such purposes and other and further proceedings as were required by the aforesaid decision of this Court dated September 17, 1953, and

It now appearing from the Administrative File and Record of Proceedings submitted to this Court herewith that (109) the Administrative Hearing was reopened and that all matters and proceedings required by the aforesaid decision of this Court, dated September 17, 1953, were had and accomplished in accordance with the said decision of this Court, it is

ORDERED, that the Writ of Habeas Corpus be and the same hereby is dismissed and discharged, and it is

FURTHER ORDERED, that the relators above-named, Lee Kum Hoy, Lee Kum Cherk and Lee Moon Wah be, and hereby are remanded to the custody of the respondent.

Dated: New York, N. Y., July , 1954.

.....

U. S. D. J

(Unsigned.)

Opinion Filed September 1, 1954, Conditionally Sustaining Writ

(97)

#221

[SAME TITLE]

APPEARANCES:

HONG & GIM, ESQS.,
Attorneys for Relators
551 Fifth Avenue
New York 17, N. Y.

Benny Gim, Esq.,
Of Counsel.

HONORABLE J. EDWARD LUMBARD
United States Attorney for the
Southern District of New York
Attorney for Respondent

Harold R. Tyler, Esq.,
Assistant United States Attorney

Lester Friedman, Esq.,
Attorney, Immigration and
Naturalization Service,
Of Counsel.

(98)

OPINION

DIMOCK, *D. J.*

This writ of habeas corpus was originally sued out to attack the right of respondent to hold three persons of the Chinese race born in China who had been excluded

Opinion Filed September 1, 1954,
Conditionally Sustaining Writ

from the United States. They had contended that they were American citizens by virtue of the citizenship of one Lee Ha whom they claimed as their father. They were then held pursuant to a determination of a Board of Special Inquiry rejecting the claim of paternity. The determination was based largely upon the results of blood tests which were held to preclude the possibility of the claimed paternity.

On a previous hearing I held that relators had been denied opportunities to which they were entitled to attack the blood tests. I therefore directed that the writ should be sustained unless the hearing before the Board of Special Inquiry be reopened for proceedings which would afford relators those opportunities.

The hearing was reopened and relators were afforded all of the rights to which I had held them to be entitled. They declined to avail themselves of the opportunity to present the results of further blood tests. The Board of Special Inquiry reached the same result as on the earlier hearing and its determination was sustained by the Board of Immigration Appeals. So far as quantum of the evidence is concerned, there was before the Board of Special Inquiry and the Board of Immigration Appeals, (93) if we include the blood test testimony, more than that minimum necessary to render their conclusion safe against attack as reached without due process of law.

On that basis the Government asks an order dismissing the writ. Relators, however, point to two matters left undecided by my previous opinion: first, the point that the mere requirement of a blood test is a denial of due process of law and, second, the claim that, blood tests are actually used only in the cases of persons of the

Opinion Filed September 1, 1954, Conditionally Sustaining Writ

Chinese race and that this limitation of the use of the tests constitutes such discrimination as to deny these relators due process of law.

I found it unnecessary when the case was originally before me to decide either of these questions since there was no sufficient evidence that the blood tests here were actually required of these relators and their parents. Additional evidence taken establishes, first, that the tests were administered as if they were a matter of course though the subjects were not advised expressly that the relators would be excluded if they and their parents did not submit, and, second, that none of the subjects made any objection.

Putting the construction on the evidence least favorable to the Government it might be said, first, that relators were told: "Unless you and your alleged parents submit to blood tests your claim of American citizenship will not be accepted" and, second, that, as a result of this compulsion, relators and the alleged parents submitted to the tests. Relators' position (100) must be that the use of evidence obtained by this means deprived them of their liberty without due process of law. They do not contend that, where authorized by an act of the legislature, the requirement of a blood test violates constitutional rights. See *Camden and Suburban Ry. Co.* v. *Stetson*, 177 U. S. 172; *Beach* v. *Beach*, D. C. Cir., 114 F. 2d 479; *Lue Chow Kon* v. *Brownell*, D. C. S. D. N. Y., decided by Irving R. Kaufman, J., June 22, 1954; Civ. 62-394. Relators assert that resort to blood tests by the immigration authorities without Congressional sanction deprived them of their constitutional rights.

The immigration authorities are charged with the duty

of determining the truth of the claims of those who apply for admission to the country as children of citizens. Blood tests, properly taken, can absolutely exclude the possibility of paternity in certain cases. Congress might constitutionally authorize the immigration authorities to require submission to a blood test as a condition to admission. An examining board does not overstep constitutional bounds if it, on its own authority, makes the same requirement. An applicant's refusal to submit to a blood test raises the logical inference that he knows that paternity does not exist and fears that its non-existence may be disclosed by the test.

The cases that emphasize the lack of statutory authority to require physical examination, such as *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250, *Camden & Suburban Railway* v. (101) *Stetson*, 177 U. S. 172, *supra*, *Howland* v. *Beck*, 10 Cir., 56 F. 2d 55 and *Taylor* v. *Diamond*, 241 App. Div. 702, deal with orders by a court that litigants submit. It is pointed out by the leading case, *Union Pacific Ry. Co.* v. *Botsford*, that it is open to a jury to draw such inferences as it may think warranted from the fact that a litigant refuses to submit to a physical examination even where the court has no power to compel submission. As I understand the situation here, the immigration authorities do not assert the power to compel submission to blood tests; they merely reserve to themselves the right to presume, from a refusal to submit to a blood test, that the result would be unfavorable to the refusing party.

It is true that the enforcement of the rule "no blood test, no admission" might be unfair in some cases. It is conceivable that the person alleged by the applicant to be his father might, for reasons of his own, refuse to

submit to blood test so that the applicant, though willing to submit himself to the test, would be powerless to meet the condition. Relators, however, make no claim that any such state of facts exists here. Their claim is the bald one that the immigration authorities cannot in any case require submission to a blood test as a condition to admission as a child of an American citizen. I cannot accept that contention.

That brings me to relators' contention that blood tests are required only in the case of persons of the Chinese race and that such discrimination deprives them of due process of law.

(102) To substantiate their claims relators say that blood tests are required in the case of Chinese even where birth certificates are available and are never required in the case of others. On that subject relators' counsel wrote respondent, before the reopened hearing by the Special Inquiry Officer, requesting that an Official of the District Office of the Immigration and Naturalization Service be available to testify with regard to the practices of the Immigration Service and its policies with regard to the blood testing of Chinese persons and submit a statistical report on the following:

> (a) how many persons have been given blood tests for the purpose of disproving paternity since May 8, 1952.
>
> (b) how many of these persons have been from the Chinese race and how many from other races.
>
> (c) how many of the Chinese persons tested had birth certificates or other documentary evidence of their identity and how many did not.

Opinion Filed September 1, 1954, Conditionally Sustaining Writ

(d) of the persons of other than the Chinese race, how many of those given blood tests had birth certificates or other documentary evidence of their identity and how many did not.

On the reopened hearing counsel for relators asked the Special Inquiry Officer whether a person had been produced pursuant to this request. The Special Inquiry Officer replied "I find that it is not necessary to produce an official of the Immigration Service to testify with regard to policy as I feel that it has no bearing on the decision in this case as to whether it is the policy or is not the policy of the Immigration Service to test all Chinese applicants for admission to the United States." This was clear notice to relators that the Special Inquiry (105) Officer would regard as immaterial evidence that persons of other races, though they did not produce birth certificates, were not subjected to blood tests.

Nevertheless the Special Inquiry Officer discussed in his opinion the claim of discrimination. He said "This is predicated upon the fact that it is believed by counsel that as blood typing tests are only conducted on persons of Chinese descent that this is prejudicial. • • • This does not mean by any stretch of the imagination that this same system could not and has not been used in cases of a similar nature. It just so happens that in no other situation has this question arisen."

The Board of Immigration Appeals said in its opinion "It is our belief that the issue of racial discrimination is not proper in this case."

Relators were denied due process of law by the Special Inquiry Officer's ruling on the hearing that the Immigra-

tion Department's policy had no bearing on the case and by the Board of Immigration Appeals' ruling that the issue of racial discrimination was not proper in the case.

The failure to take evidence on the question of discrimination could be justified only by a holding that under no set of circumstances would requirement of blood tests of Chinese and non-requirement of blood tests of others amount to unconstitutional discrimination. Such a holding could not be supported in law. If the facts established a deliberate use of the blood test technique to exclude Chinese and admit other similarly (104) qualified except for race, the discrimination would clearly be unconstitutional.

Relators contend that blood tests are used only in cases of Chinese applicants and that they are used in all cases of Chinese appl cants. The Government seeks to explain any such practice by the fact that China is the only country where records of births and marriages are not kept so that mere force of circumstances requires blood tests only in the cases of Chinese. Relators further contend that the Government is satisfied to accept documents in the case of applicants of other races but that, in the cases of Chinese, blood tests are required even when documents are available. Substance to the latter claim is lent by the cases of *Goon Hew Man* (V. P. 3 8290, application now pending at the U. S. Consulate in Hong Kong) and *Lee Soo Yiu* (N. Y. 0300-422307). In the Goon case a contemporaneous birth certificate issued by the British government at Hong Kong was produced, and in the Lee case a contemporaneous birth certificate issued by a large hospital in Canton was produced, and yet in both cases, blood tests were still required.

Relators allege deliberate use of the blood test tech-

nique to exclude Chinese and admit others similarly qualified except for race. This result is reached, they say, because the application of the blood tests to Chinese and not to others constitutes more stringent enforcement of the immigration laws against Chinese than against others. Chinese persons, they say, are always subjected to the rigorous inquisition of a blood test (105) while others, no matter how inconclusive may be the other evidence, are never subjected to a blood test. If such a deliberate use of the blood test technique to exclude Chinese exists, the discrimination against Chinese is clear even though the result may be to allow the admission of unqualified non-Chinese rather than to prevent the admission of qualified Chinese. It makes no difference that the complaint of the Chinese is against a failure to go to the full extent of the law in the case of non-Chinese rather than against going beyond the law in the case of Chinese. A minority could be as effectively persecuted by enforcing a law against them alone as by acting against them without warrant of law.

Racial discrimination is abhorrent to our institutions. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Hirabayashi* v. *United States*, 320 U.S. 81, 100; *Bolling* v. *Sharpe*, 347 U.S. 497. The courts, in habeas corpus proceedings, struck down a statutory scheme which prescribed a different rule for determining paternity where a Chinese applicant sought admission as a child of a citizen than where the applicant was of another race. *Quan Ling Sun* v. *White*, 9 Cir., 254 Fed. 402; *Jeong Quey How* v. *White*, 9 Cir., 258 Fed. 618.

Whether or not the requirement of blood tests in the case of Chinese applicants amounts to unconstitutional discrimination can only be determined by an examination

Opinion Filed September 1, 1954,
Conditionally Sustaining Writ

of the facts. It may be that something less crude than a deliberate use of the blood test technique to exclude Chinese and to admit others (106) would amount to unconstitutional discrimination but that need not be decided until the facts are ascertained.

The writ will be sustained unless, within 20 days from the date of the order to be entered hereon, the hearing before the Board of Special Inquiry is reopened for the purpose of (a) the introduction of evidence with respect to the requirement of blood grouping tests in the cases of persons of the Chinese race and the omission to require blood grouping tests under similar circumstances in the cases of persons of other races and (b) the determination, upon such evidence, of the issue of discrimination.

Dated: August 31, 1954

E. J. DIMOCK.
United States District Judge

Order Filed September 16, 1954 Conditionally Sustaining Writ.

(110)

[SAME TITLE]

A Writ of Habeas Corpus having come on to be heard before this Court on July 13, 1953; and Messrs. Hong & Gim (Benny Gim, of Counsel), attorneys for relators, having been heard in support of the Writ, and J. Edward Lumbard, United States Attorney for the Southern Dis-

Order Filed September 16, 1954,
Conditionally Sustaining Writ

trict of New York (Harold R. Tyler, Jr., Assistant United States Attorney, of Counsel) attorney for the respondent, having been heard in opposition thereto, and due deliberation having been had, and upon reading and filing the petition for the Writ of Habeas Corpus, verified on July 10, 1953, the return to the Writ, dated July 22, 1953 and the traverse to the return dated July 27, 1953, and the Court having, on September 17, 1953, filed its decision dated September 17, 1953, and upon the motion for reargument of said writ having been made by the respondent on September 30, 1953, and due deliberation having been had, and the Court having denied said motion on October 7, 1953, and

Upon the order of this Court of October 16, 1953, and upon the reopened proceedings before the Special Inquiry Officer of the Immigration and Naturalization Service, and the Board of Immigration Appeals, and upon reading (111) the entire record of the said proceedings, and upon a motion for an order dismissing said writ of habeas corpus having been made by the respondent, and the aforesaid attorney for respondent having been heard in support of the motion, and the aforesaid attorneys for the relators having been heard in opposition thereto, and due deliberation having been had,

Now, on motion of Hong & Gim (Benny Gim, of Counsel), attorneys for relators, it is

ORDERED that the writ of habeas corpus herein will be sustained unless, within 20 days from the date of entry of this order, the hearing before the Board of Special Inquiry is reopened for the purpose of (a) the introduction of evidence with respect to the requirement of blood

Order Filed September 16, 1954,
Conditionally Sustaining Writ

grouping tests in the cases of persons of the Chinese race and the omission to require blood grouping tests under similar circumstances in the cases of persons of other races and (b) the determination, upon such evidence, of the issue of discrimination, and it is further

ORDERED that either party hereto, upon notice to the other may apply to this Court for further or final orders herein in connection with further administrative action to be taken in conformance with the decision of this Court dated August 31, 1954.

Dated: New York, New York
September 16, 1954

E. J. DIMOCK
U. S. D. J.

Unsigned Proposed Order for Dismissal of Writ

(151)

[SAME TITLE]

A writ of habeas corpus having come on to be heard before this Court, and after intermediate proceedings herein, the decision of this Court dated August 31, 1954 having remanded the cause to the Immigration & Naturalization Service with the direction that the writ will be sustained unless the administrative hearing is reopened for the purposes set forth in the said decision and an

intermediate order of this Court dated September 16, 1954 having been entered herein, upon the decision of this Court, and it appearing from the annexed affidavit of Harold J. Raby, Assistant United States Attorney, and from the administrative record containing the complete proceedings including that portion of the proceeding which was reopened upon the order of this Court, and it appearing from the said administrative record that compliance was had with the intermediate decision and order of this Court,

Now, on application of J. Edward Lumbard, United States Attorney for the Southern District of New York, attorney for respondent, it is

ORDERED that the writ of habeas corpus herein be (152) and the same hereby is dismissed, and it is

FURTHER ORDERED that the relators herein be and they are hereby remanded to the custody of the respondent.

Dated: New York, N. Y., June , 1955.

.....

U. S. D. J.

(Unsigned.)

Affidavit of Harold J. Raby

(153)

[SAME TITLE]

State of New York,
County of New York,
Southern District of New York—ss.:

HAROLD J. RABY, being duly sworn, deposes and says that he is an Assistant United States Attorney in the office of the United States Attorney for the Southern District of New York, that the above-entitled matter has been assigned to him and that he has familiarized himself with the proceedings heretofore had herein. This affidavit is submitted in connection with the respondent's application for dismissal of the writ of habeas corpus on the ground that full compliance has now been had with the intermediate decision and order of this Court, and that the record herein clearly demonstrates that relators have failed to establish their alleged charge of procedural discrimination against them by reason of their race.

Pursuant to arrangements made with counsel for the relators, the Immigration hearing was reopened commencing October 28, 1954. The relators were given a full opportunity to examine a witness produced by the government as they requested to testify concerning the policies of the Immigration authorities with respect to cases such as those at bar. In addition, the relators were permitted to name (154) any files, the relevant facts of which they wished incorporated into the record for consideration. The pertinent information from such files was read into the record. However, relators offered no independent evidence of any kind to substantiate their

frivolous claim that blood test evidence was used in this case only because relators happened to be of the Chinese race.

The Special Inquiry Officer before whom the reopened hearing was held, on January 18, 1955, again ordered the relators excluded from admission to the United States and found, as a fact, upon the evidence before him that there was no discrimination against the relators by reason of their race. This finding was affirmed on administrative appeal by decision of the Board of Immigration Appeals dated May 5, 1955.

The record of the administrative proceedings herein, including the reopened proceedings referred to above, are incorporated herein by reference with the same effect as if each and every part thereof were set forth herein in full.

The attention of this Court is particularly directed to the recent decision in this Circuit in the cases of *Kon, et al* v. *Brownell* (C. A. 2, 1955) F. 2d and *Ott and Han* v. *Shaughnessy* (C. A. 2, 1955) F. 2d, wherein on the basis of similar factual backgrounds with respect to the necessity for the use of blood tests, it was held that there was no basis for any charge of discrimination.

In view of the foregoing, it is respectfully prayed that a final order be entered herein dismissing the writ of habeas corpus and remanding the relators to the custody of the respondent.

(155 and 156) If the Court desires to hear argument after examining the record of this case, we are certain that both sides will be available at the convenience of the Court.

HAROLD J. RABY

(Sworn to June 7, 1955.)

Opinion Filed August 8, 1955, Sustaining Writ

(140)

#288

[SAME TITLE.]

APPEARANCES:

HONG & GIM, ESQS.,
Attorneys for
Lee Kum Hoy and
Lee Kum Cherk,
551 Fifth Avenue,
New York, N. Y.

Benny Gim, Esq.,
Of Counsel.

EDWARD H. ENNIS, ESQ.,
Attorney for

Lee Moon Wah
165 Broadway
New York, N. Y.

HONORABLE J. EDWARD LUMBARD
United States Attorney for the
Southern District of New York
Attorney for Respondent

Harold J. Raby, Esq.,
Assistant United States Attorney
Of Counsel

Opinion Filed August 8, 1955, Sustaining Writ

(141)

OPINION

DIMOCK, *D. J.*

Respondent has submitted a form of order dismissing a writ of habeas corpus. The writ was originally sued out to attack respondent's right to hold three children of the Chinese race born in China who had been excluded from the United States. They had claimed American citizenship by virtue of one Lee Ha whom they claimed as their father. The Board of Special Inquiry, largely on the basis of blood tests held to preclude paternity, rejected their claim and they were taken in custody pursuant to that determination. I held that relators had been wrongfully denied opportunities to attack the blood tests and directed that the writ should be sustained unless the hearings were reopened in order to afford relators those opportunities. *United States* v. *Shaughnessy*, 115 F. Supp. 302. The hearings were reopened and relators were afforded the opportunities to which they were entitled. The Board of Special Inquiry reached the same result as it had on the earlier hearing and its determination was sustained by the Board of Immigration Appeals. Following the decision of the Board of Immigration Appeals respondent sought, before me, a dismissal of the writ. On that occasion, the second time that the matter was before me, relators claimed: first, that the mere requirement of a blood test was a denial of due process of law and, second, that blood tests were actually used only in cases of (142) persons of the Chinese race and that this limitation of the use of the tests constituted such a discrimination as to deny these relators due process of law. I held that relators' first point was unfounded but that "[i]f the facts established a deliberate use of the blood test tech-

nique to exclude Chinese and admit others similarly qualified except for race, the discrimination would clearly be unconstitutional" and I stated that the writ would be sustained unless the hearing before the Board of Special Inquiry were reopened "for the purpose of (a) the introduction of evidence with respect to the requirement of blood grouping tests in the cases of persons of the Chinese race and the omission to require blood grouping tests under similar circumstances in the cases of persons of other races and (b) the determination, upon such evidence, of the issue of discrimination." *United States* v. *Shaughnessy*, 123 F. Supp. 674. Following the decision the hearings were reopened. Relators sought from me a direction that documents on the subject of discrimination be produced before the Special Inquiry Officer. I held it beyond my power to grant the application. *Hoy* v. *Shaughnessy*, 16 F. R. D. 558. The Special Inquiry Officer found, as a fact, that "there was no discrimination at the time these applicants sought admission to the United States in 1952", and reached the same result as before. His determination was affirmed by the Board of Immigration Appeals. The case is now before me, for the third time, on respondent's application for an order dismissing the writ.

(143) The issue of discrimination has been thrown into such bold relief in the case and relators have made such extra ordinary efforts to get into the record all that the Government possessed on the subject, that I am justified in determining that issue upon that record.

It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The Government has been unable to point to a single in-

stance where a white person had been subjected to a blood test or a Chinese excused from one.

In July of 1953, when charges of racial discrimination against the Chinese in blood tests were first made in relators' application for a writ of habeas corpus, the government denied that Chinese were singled out for such tests and claimed that blood tests were required in all cases where there were no birth certificates or other documents of identity. Thus, in the Government brief, it was stated that blood tests were not imposed upon Chinese persons alone, but upon "all persons attempting to enter the United States without birth certificates and similar documents". Similar statements were contained in several subsequent government affidavits to the effect that blood tests were required only in those cases where there was an absence of birth certificates and other documentary evidence of identity.

In answering this argument of the government, relators (144) cited two cases where Chinese persons were blood tested notwithstanding the fact that they had birth certificates. This was noted by me in my decision at 123 F. Supp. 674, 677, *supra*, where I said that these two cases lent substance to the claim that Chinese, regardless of the availability of birth certificates or other documents, are always subjected to a blood test while other persons never were.

In the reopened hearing following that decision, the Immigration Bureau witness sought to minimize the importance of birth certificates in determining whether a blood test was necessary, stating that it was "only one of the many criteria" for determining whether a blood test was needed in a particular case. According to the witness there are three common patterns of children of American citi-

zens born abroad who apply for admittance to the United States as citizens. The first involves an American child in an "American colony" abroad, whose parents keep in close touch with the Consulate, and where the births and marriages would be registered at the Consulate. The second pattern, which, like the first, is not the usual pattern for Chinese children, would be where the American parent is not known to the Consulate, but where birth and marriage certificates are produced to substantiate the claim and, most important, the children involved are born in an area where the Consul could speedily conduct an investigation and ascertain from neighbors, friends and local government officials, the true identity of the child.

(145) In the foregoing two patterns of cases, the witness stated "there would be no need for using blood test evidence to verify an obvious relationship". The third type of situation was one which he said was typical of Chinese. This was where the child was born in the remote interior of China, where no birth or marriage certificates were kept, and, most important of all, the claimed area of birth was inaccessible to the Consul and hence where he could not conduct any investigation as to the circumstances of the child's birth. The witness then concluded and reaffirmed on cross examination that the most important factor in determining whether a blood test would be required is whether a child is born in an area where the Amenrican Consul can readily conduct an investigation. He said that, if the Consul could verify the identity of the child involved from his investigation, by talking to neighbors, friends and local officials, there would be no need for a blood test.

Although the witness testified that the most important criterion for determining the necessity of a blood test—

namely, the ability of the consulate to investigate the area of a person's birth—had been a factor in immigration investigations which antedated by a long time the use of blood tests, he admitted that, in the government brief filed when this case was first argued, there was no mention at all of this "most important" criterion. Similarly, in the subsequent government affidavits filed prior to the issuance of my decision, the Immigration Service had stated (146) specifically that blood tests were required in cases where there were no birth certificates or documentary evidence, and there was no mention whatsoever of the feasibility of a consular investigation as being determinative of whether blood tests were necessary.

To show that Chinese persons claiming a right to enter the country as children of United States citizens are always required to submit to blood tests, irrespective of how satisfactory their other proof as to identity was and regardless of whether they were born in an area where a consular investigation was possible, relators cited several cases as examples.

Exhibit #27 involved L-L the son of L-H, an American citizen of Chinese descent. L-L was born in Hong Kong, and produced a contemporaneous official birth certificate issued by the British government to prove his identity. This certificate stated the names of his parents and the place and date of his birth. In addition, the parents of L-L, having been married in Hong Kong, produced a marriage certificate. Most important, the son and mother were living in Hong Kong, and an investigation by the American Consul there was throughly feasible, and in fact conducted. Nevertheless, L-L, a child only a year and a half old at the time, was subjected to a blood test along with his father and mother.

Opinion Filed August 8, 1955, Sustaining Writ

Exhibit #28, involves Ng Ho Gim, an American citizen of Chinese descent, who petitioned for his six year old son who was living in Hong Kong with his mother. His son was born in (147) Hong Kong and his birth was registered at the American Consulate which issued a certificate verifying the birth of the child and the marriage of the parents. Notwithstanding the American Consulate's own certificate acknowledging the identity of the child and the fact of his parents' marriage, and in spite of the fact that the child was living in Hong Kong, thus making a thorough investigation possible, a blood test was still demanded of the parents and the child.

Exhibit #29 involves a naturalized American citizen of Chinese descent who married a Chinese alien woman in Hong Kong who subsequently gave birth to a child there. In a petition to bring his son over, the citizen submitted a contemporaneous birth certificate issued by the British government for his son, and his marriage certificate, also issued by the British government. In addition, the son and wife were living in Hong Kong where an investigation was feasible. But most important there were prior records of the wife and son at the American Consulate and the Consul had been for a long time cognizant of the family relationship of the individuals. Nevertheless, a blood test was required of all the parties.

Exhibit #30 involves an American citizen of Chinese descent who married a Chinese alien in Hong Kong to whom a son was later born, also in Hong Kong. The citizen parent had a contemporaneous birth certificate issued by the British government for his son, and a contemporaneous marriage certificate for his (148) marriage issued by the British government. In addition, the

child being born and living in Hong Kong with his mother, the American Consul was able to conduct a thorough investigation. Nevertheless, a blood test was required.

These instances of imposition of blood tests in the cases of Hong Kong Chinese takes this case out of the rule of *Lue Chow Kon* v. *Brownell*, 2 Cir., 220 F. 2d 187, and *Dong Wing Ott* v. *Shaughnessy*, 2 Cir., 220 F. 2d 537, in each of which Judge Smith sustained a practice of subjecting to blood test all Chinese born in China, pages 190 and 540 respectively, on the ground that that circumstance interposed great obstacles to investigation.

The worst that can be assumed is that these three Chinese children sought admittance to the United States upon a false claim of paternity. They made an affirmative showing of paternity that would have been sufficient but for the requirement that they submit to blood tests. They have been excluded. Members of the white race in exactly the same position are admitted. The Chinese and white persons thus differently treated constitute a single class but for their color. The Chinese of this class are excluded and the whites admitted. That constitutes a deliberate strict enforcement of the immigration laws in the case of Chinese and a deliberate loose one in the case of whites. As I stated in *United States* v. *Shaughnessy, supra*, 123 F. Supp. 674, at pages 677-678, such a practice violates the constitution. See, besides the cases there cited, *Brown* v. *Board of Education*, 347 U. S. 483; (149) *Mar Gong* v. *Brownell*, 9 Cir., 209 F. 2d 448; *Lan Hu Yuen* v. *United States*, 9 Cir., 85 F. 2d 327.

It is true that these relators were born in China and that the *Kon* and *Ott* cases hold that Chinese born in China may be lawfully excluded under a practice which

requires blood tests of Chinese born in China and of no others. Have these relators, who could thus have been lawfully excluded if that had been the practice, standing to raise the question of the constitutionality of their exclusion where the practice was to require blood tests of all Chinese? I recognize that one who attacks a practice as unconstitutional must show that it is unconstitutional as to him but that is exactly what relators have done here. They have shown that the practice excludes them where whites, in exactly the same circumstances, would have been admitted. The fact that they could have been lawfully excluded under a practice of requiring blood tests of all Chinese born in China and of no others is immaterial. That was not the practice under which they were excluded and which they are now attacking.

The imposition of blood tests in the cases of relators under the prevailing practice violated their constitutional rights to be free from discrimination. Except for the evidence in connection with blood tests the record would have entitled them to admission. Their writ of habeas corpus is sustained.

Dated: August 8, 1955.

E. J. DIMOCK
United States District Judge

Respondent's Notice of Motion for Reargument

(157)

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE, that on the annexed affidavit of Harold J. Raby, sworn to the 15th day of August, 1955, and upon all the proceedings heretofore had, the undersigned will move this Court on the 23rd day of August, 1955, at Room 506, United States Court House, Foley Square in the Borough of Manhattan, State, County and Southern District of New York at 10 o'clock in the forenoon of said day, pursuant to Rule 9(h) of the general rules of this Court, or as soon thereafter as counsel can be heard, for reargument of this Court's decision dated and filed August 8, 1955, wherein and whereby it was ordered and adjudged that the writ of habeas corpus herein be sustained.

Dated: New York, N. Y.
August 15, 1955.

Yours, etc.,

LLOYD F. MACMAHON
United States Attorney
Southern District of New York
Office & P. O. Address:
United States Court House
Foley Square 7
New York

To:

HONG AND GIM, Esqs.
551 Fifth Avenue
New York 17, N. Y.

Affidavit of Harold J. Raby in Support of Respondent's Motion for Reargument

(158)

[SAME TITLE]

State of New York,
County of New York,
Southern District of New York—ss.:

HAROLD J. RABY, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York and represent the respondent in this case.

This affidavit is submitted in support of an application, pursuant to Rule 9(h) of the rules of this Court for reargument of the decision of this Court dated and filed August 8, 1955 wherein the Court (per Hon. Edward J. Dimock, District Judge) directed that a writ of habeas corpus be sustained on the ground that the relators, incident to their exclusion from admission to the United States as purported citizens, had been discriminatorily subjected to blood tests.

3. This Court, in a prior decision, reported in 123 F. Supp. 674, remanded this case to the Immigration Service for a hearing to determine whether the Service discriminated against persons of the Chinese race in administering blood tests in connection with applications by purported derivative citizens of the United States for entry into the United States as citizens. Upon such (159) hearing, and review thereof by the Board of Immigration Appeals, the charge of discrimination was rejected as

unproved, at least with respect to Chinese persons seeking to enter the United States from China. With respect to relator's contention that Chinese persons resident in Hong Kong did not need to be blood-tested, but were nevertheless subjected to discriminatory testing, the Board stated: "If it is alleged that racial discrimination was practised by the requirement of blood tests in [the Hong Kong cases], we will have to decide those cases on their own facts as they come before us."

4. Upon reviewing the above administrative determination, however, this Court rendered a decision on August 8, 1955, which appears to be based in large part upon the conclusion that the Government had not affirmatively *disproved* the existence of discrimination, by showing that there were cases of Chinese people who had been exempted from blood tests, or that there were cases of white people similarly situated who had been given blood tests. Particular reference is made, in this connection, to the following language of the Court's opinion:

> "It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The government has been unable to point to a single instance where a white person has been subjected to a blood test or a Chinese excused from one."

5. Judge Dimock also disagreed with the Board's legal holding that relators were not entitled to relief

even assuming that they had proved that other Chinese persons in a different category, i. e., Hong Kong residents, were discriminated against.

(160)

6. Thus, on the basis of this Court's disagreement with two legal conclusions—first, that the burden of proof was on the relators, and secondly, that the relators had no standing to complain of assumed discrimination against other types of Chinese persons, this Court has not only reversed a determination of the Board, but has unconditionally sustained the writ, thus, in effect, admitting to the United States as citizens, persons who by competent medical evidence have been shown to be imposters.

7. Reargument is sought on the following grounds:

(a) Your deponent believes that the administrative record does not fairly support a conclusion that the relators affirmatively proved discrimination; and that the only possible basis for the conclusion that discrimination exists is the failure of the Service (alluded to by the Court) to offer specific cases of blood testing of white persons, or examples of exemptions from blood testing (in proper cases) of Chinese-born persons. If this is in fact the basis on which the case has been decided adversely to the Government, deponent respectfully urges that this Court has misconceived the burden of proof.

(b) Inasmuch as the administrative determination was based on the prior assumption that the burden of proof was on relators and the further prior assumption that such proof could not, as a matter of law, be sustained by citing examples of presumed discrimination against

Chinese persons in a category different from that of relators, the interests of justice would seem to require the supplementation of evidence in the light of (161) this Court's rulings made subsequent to the administrative proof-taking. While deponent believes that the administrative ruling was correct in both of the above respects, if one is to assume the contrary, the writ should not be sustained, but final decision should await such further proof as the Government is prepared to offer in view of a court ruling requiring the Government to disprove discrimination.

8. In this connection, your deponent can see no useful purpose in the remanding of this case to the Immigration Service, and respectfully proposes that this Court, in the exercise of its statutory hearing powers in habeas corpus, hold a hearing to determine the objective facts relative to Government blood testing. Your deponent proposes, at such hearing, to introduce proof pertaining to the use of blood tests in cases involving white persons, as well as proof as to whether Chinese persons have ever been exempted from blood tests—specifically identifying such cases, and where practical, making the hearing records thereof available to the court.

WHEREFORE, it is prayed that reargument of this writ of habeas corpus be allowed, and that, upon such reargument, this Court hold a plenary hearing to determine whether there is any basis in fact for relator's charge that persons of the Chinese race have been discriminated against in the administration of blood tests by the United States Government; and that, in the event the Govern-

ment sustains its assumed burden of disproving the existence of discrimination, the prior decision of this Court of August 8, 1955, be recalled, and the writ dismissed.

HAROLD J. RABY
Harold J. Raby
Assistant U. S. Attorney

(Sworn to August 16, 1955.)

Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument

(162)

[SAME TITLE]

State of New York,
County of New York,
Southern District of New York—ss.:

BENNY GIM, being duly sworn, deposes and says:

That I am the attorney of record for the relators herein and I am submitting this affidavit in opposition to respondent's motion to reargue the decision of this Court dated August 8, 1955, wherein the writ of habeas corpus was sustained.

Respondent's motion in substance appears to be based on two grounds: (1) Respondent alleges that this Court erroneously applied the burden of proof upon the government to prove the non-existence of discrimination, and

Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument

(2) Assuming that respondent is legally required to disprove discrimination, the entire case should be reopened to allow the government to introduce "proof" of blood tests involving white persons and whether Chinese persons have ever been exempted from such a requirement.

As to the allegation that this Court erroneously applied the burden of proof of non-discrimination upon the government, relators contend that an examination of the entire hearing record and the three decisions of this Court shows this allegation to be unfounded. Relators presented over- (163) whelming and uncontradicted evidence from their own witnesses, records and documents and admissions from government witnesses which demonstrated beyond any doubt that blood tests were imposed upon Chinese and not upon white persons. Thus, Dr. George F. Cameron, Medical Director of the Public Health Service, and the person in charge of blood tests for the government, testified that his authority to conduct blood tests was a circular from the Federal Security Agency, entitled "Blood-Type Testing on Request of the Immigration and Naturalization Service." He said that circular directed blood testing of certain United States citizens of Chinese descent and that it did not specify blood tests for persons of other races or nationalities (R. 61, 62, 63). He further said that acting under the orders of this circular, he blood tested 200 Chinese persons and did not test a single person of any other race (R. 61, 62, 63). Dr. Leon Sussman, a private medical expert selected by the Immigration Service to conduct blood tests, also testified that he had blood tested about 300 Chinese persons and had never blood tested a single white person (R. 36, 37).

At the second reopened hearing, the Immigration Serv-

ice produced a witness, Lester Friedman, who was described by the Special Inquiry Officer in his decision as "well qualified" to speak on the procedures, policies and rules of the Immigration Service bearing on blood tests. Mr. Friedman also stated that he had been selected to testify because he was "the one person who apparently had the most intimate knowledge" of this subject (R. 121).

This Court noted that this witness was unable either to point to a single case of where a white person had been blood tested or a Chinese person excused from one. As this (164) witness is the one person in the entire Immigration Service with the most intimate knowledge of blood tests, there is no reason to doubt this Court's finding.

In view of the foregoing, it is submitted that the mass of uncontradicted evidence conclusively establishes that only Chinese persons and not white persons similarly situated were required to take blood tests.

However, assuming arguendo, that the Court did place some burden of proof on the respondent to justify what has been shown to be a racial classification by the Service, such action was not erroneous. As distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality (*Hirabayashi* v. *U. S.* 320 U. S. 81, 100), the government must be able to justify such distinctions or classifications by the affirmative showing of "compelling justification" and "exceptional circumstances" (*Oyama* v. *State of California,* 332 U. S. 633). This, the government tried to do in attempting to justify the imposition of blood tests solely upon Chinese persons, first on the alleged lack of birth certificates, and then later shifting to the alleged inability of the American Consul to investigate the areas of their claimed birth.

Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument

These two justifications were shown on cross examination to be hastily contrived afterthoughts to cover up a classification which in reality was based solely upon race. That such a classification is used by the Immigration Service was all the more conclusively demonstrated by the introduction into evidence of the blood test cases of Hong Kong born Chinese who had birth certificates and who had never been in China, and whose parents had marriage certificates. These cases were not irrelevant to the issue of discrimination, (165) as respondent now contends in his affidavit, but they pointed up the fact that the blood tests are imposed on a racial rather than rational basis.

Respondent makes the request in his affidavit that the proceedings be reopened at this final stage, after this Court has rendered its adverse decision based upon the full and complete record of three separate administrative hearings and three separate proceedings before the Board of Immigration Appeals, in each of which the respondent had full opportunity to present whatever evidence they deemed to be in their favor. The affidavit contains the bare allegation that the government *proposes* to introduce "proof" to disprove the charge of discrimination. No such proof has been adduced and if the Immigration Service expert witness, Lester Friedman, was unable to produce such proof, it is reasonable to conclude that such proof does not in fact exist. However, even assuming for the sake of argument, that there is such proof, this fact would not justify the reopening of this hearing at this final stage, three years after its beginning. Respondent's motion for reargument and reopening of the proceedings for the reception of additional evidence is in effect a request for a new trial on grounds of alleged newly discovered evidence (See *Hunter* v. *Thomas* 173 F. 2d 180).

Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument

An applicant for a new trial upon newly discovered evidence is required to rebut the presumption that there has been a lack of diligence (*U. S.* v. *Hansen,* 142 F. 2d, 232). As stated by the Court in *Aladdin Mfg. Co.* v. *Mantle Lamp Co. of America,* 116 F. 2d, 708, 712:

> "• • • upon an application for re-examination, whether it be by way of motion for new trial, petition for rehearing or in other form, before the court will act affirmatively, some equitable ground for re-examination must be presented. And, ordinarily, where no new (166) evidence is offered or if new evidence is offered and lack of diligence in procuring it exists, the application will be denied".

See also: *Brown* v. *Schwartz* 164 F2d 151; *Peterman* v. *Indian Motorcycle Co.* 216 F2d, 289. The same rule applies in administrative hearings (*Wong Shong Been* v. *Proctor,* 79 F2d. 881 Cert. den. 298 U. S. 665).

In the proceedings at bar, it should be noted that any evidence, if such exists, of white persons being blood tested or Chinese persons excused from such requirement, has been at all times within the exclusive possession and custody of the Immigration Service. If there was such evidence, it could have been introduced and set forth in any one of the numerous affidavits submitted by the respondent in the writ proceedings, in the two reopened hearings following the granting of this writ, the last one of which was specifically reopened for the sole purpose of the reception of evidence on the subject of discrimination, and in the two subsequent proceedings before the Board of Immigration Appeals. In addition, it should be pointed out that in the first reopened hearing, counsel

requested the Immigration Service by letter of November 14, 1953 (Exhibit #20) to produce data as to the number of Chinese and white persons, if any, who were blood tested.

The Special Inquiry Officer refused this request saying "it is not necessary to produce" evidence on this subject (R. 44) and the Board of Immigration Appeals stated that the issue of racial discrimination was "not proper" in the case. Similarly at the second reopened hearing pursuant to this Court's decision which directed the taking of evidence on the imposition of blood tests upon Chinese persons and the omission to require such tests in cases of other persons, (167) counsel requested by letter the production of files (Exhibit #26) relating to Chinese and white persons blood tested, if any. This request was flatly refused by the Special Inquiry Officer on the grounds that such files were "confidential". Instead, the Immigration Service expert witness attempted to show non-discrimination by carefully selecting four blood test cases of what he deliberately termed as "non-Chinese" persons. On cross examination, he was forced to admit that two of these cases very likely were negroes and was unable to deny that the other two were not negroes.

The second reopened hearing, which was convened specifically for the purpose of introducing evidence on the issue of racial discrimination, was the final of a long series of opportunities in which the government could have introduced the evidence they now allege they possess. At this hearing, the Immigration Service assigned a witness to testify who was most intimately acquainted with the entire background, policies and procedures regarding the blood test and whom the Special Inquiry Officer de-

scribed as "well qualified" to speak on the subject. Neither this witness nor the Special Inquiry Officer offered any evidence of white persons being blood tested, although they were specifically requested by numerous letters to do so before the hearings. Similar oral requests were made during the hearing for the witness to cite the existence of cases involving white persons who were blood tested. Their failure to produce such evidence can only be attributed to one of two reasons: (1) No such cases existed, or (2) They were inexcusably negligent in not producing such evidence since such evidence, if in existence, was in the exclusive possession of the Immigration Service. Either one of these reasons furnish sufficient basis for denying the relief they are now seeking.

(168) Looking at respondent's motion realistically, he is asking for a chance to relitigate his case. With the wisdom acquired by hindsight, he wants another chance to bolster and shore up a weak hearing record and to shift from those legal positions which have been rejected by this Court. (Cf. *U. S. ex rel. Hadrosek* v. *Shaughnessy*, 101 F. Supp. 432, 434).

Fairness to the relators requires that respondent should not be allowed to relitigate old issues in an effort to win finally a favorable determination. As stated in *Rue* v. *Feuz Const. Co.* 103 F. Supp. 499:

> "Public policy and the Court calendar are such as not to permit a party litigant to gamble on reliance on one theory at the trial and after a contrary view of the evidence is adopted by the court and is to be followed in its judgment on the facts of the record, to seek to reopen the case to meet the other issues raised by that record, in an attempt

to make a finding in its favor on the theory adopted by the Court."

In conclusion, respondent's motion not only lacks any merit, but is procedurally defective, because he has misconceived the proper remedy in this case. If respondent believes he has discovered some subsequent evidence which would tend to show that the relators were not entitled to admission into this country, he may issue a warrant and commence deportation proceedings against the relators (Ex parte *Chin Shue Wei*, 272 F. 480; *Wong Doon* v. *Cahill*, 78 F. 2d 301 (CCA 9th)). This may be done because the doctrine of res judicata does not apply in habeas corpus proceedings (*U. S. ex rel. Volpe* v. *Jordan*, 161 F. 2d 390).

WHEREFORE, it is respectfully prayed the respondent's motion for reargument be denied in all respects.

BENNY GIM
Benny Gim

(Subscribed and sworn to August 22, 1955.)

Supplemental Affidavit of Dorris E. Yarbrough in Support of Respondent's Motion for Reargument

(188)

[SAME TITLE]

State of New York
County of New York
Southern District of New York—ss.:

DORRIS E. YARBROUGH, being duly sworn, deposes and says:

1. I am an Investigator, employed by the Immigration and Naturalization Service, stationed at New York, N. Y., in the office of the District Director of Immigration and Naturalization. My service as an Investigator commenced in January, 1949. Prior to that I was a patrol inspector, but as such I did investigative work.

2. Since February, 1949, I have been detailed principally to investigate cases involving possible frauds perpetrated by persons of the Chinese race in connection with their admission to the United States.

3. In or about the early part of 1952, in cooperation with the Department of State, I inaugurated the use of blood tests in the New York District of the Immigration and Naturalization Service, as a means of checking on claims filed by Chinese-born persons who claimed derivative United States citizenship. My prior investigative experience had disclosed many cases where such claimants had at- (189) tempted to perpetrate frauds upon the Government, and I believed that the use of blood tests

would tend to make the accomplishment of this type of fraud more difficult. This opinion was thereafter vindicated in the following respects. In several cases where Chinese-born persons had been admitted to the United States as derivative citizens prior to the inauguration of blood-testing in 1952, and where such persons applied, subsequent to 1952, for certificates of derivative citizenship blood tests were administered incident to the latter application, the results of which exposed the applicants as impostors; and, upon being confronted with the results of the blood tests, the applicants admitted perpetrating a fraud upon the Government, with the results that they now face deportation proceedings. An example of this type of situation is to be found in the case of L-Y-C, Immigration File No. 0300-440141.

4. Your deponent instituted blood testing of Chinese persons, not because of any prejudice against the Chinese race, but solely because of the fact that your deponent was assigned almost exclusively to Chinese cases. Consequently, the question of the propriety or necessity of blood testing of white persons never was within your dependent's direct cognizance.

5. However, because of my belief in the value of blood testing as an investigative device, I have been acutely aware of various attempts that have been made to discredit blood testing, by persons adversely affected by blood tests. I have, accordingly, maintained a close interest in the litigated cases of *D-W-O* v. *S*, 220 F. 2d 537, and *L-C-K* v. *D*, 220 F. 2d 187, wherein the United States Court of Appeals for the Second Circuit finally upheld the (190) scientific value of blood testing by the Immigra-

tion and Naturalization Service, and rejected, as unwarranted, the charge that the use of blood testing was discriminatory against the Chinese.

6. I have, on the other hand, read, and am familiar with, that portion of Judge Dimock's decision which alludes to the fact that, in the administrative proceedings held in this case in late 1954, the Government failed to disclose the name of a single case where a non-Chinese person had been blood tested since the inauguration of blood testing as an investigative technique, and which infers therefrom that the Immigration Service invariably blood-tests Chinese-born applicants for admission to the United States, and never blood-tests other applicants.

7. Such inference is not in accordance with the facts. Considerably before the rendition of Judge Dimock's decision of August 8, 1955, although admittedly because of the prior existence of charges of discrimination that had been leveled against the Immigration Service in this and other cases, your deponent commenced to maintain a record of blood-tests given by the New York Office of the Immigration and Naturalization Service to white persons. A lists of such cases is appended hereto, and made a part hereof, as Exhibit A. It should be stated, parenthetically, that the cases referred to in Exhibit A involve applications submitted by residents of the United States to the Immigration and Naturalization Service for the issuance of nonquota visas to purported blood relatives of the respective applicants. In the 60 cases cited in Exhibit A, blood-tests were administered both to the applicant and his or her alleged relatives.

Supplemental Affidavit of Dorris E. Yarbrough in Support of Respondent's Motion for Reargument

(191)

8. Moreover, at the request of Assistant United States Attorney Raby, your deponent has checked the record of arrivals and admissions of Chinese-born persons at the port of New York, for the period commencing March 1, 1952 and continuing through September 30, 1952. From such survey, 124 files were located involving Chinese-born persons who claimed relationship to United States citizens, and who accordingly claimed the right to be admitted to the United States on that basis. Of these 124 cases, the files show that blood-tests were given in 84 cases; and that, on the other hand, there were no blood-tests in 40 cases. The subjects involved in the aforementioned 40 cases appear to have been admitted to the United States by the Immigration and Naturalization Service, either after delayed primary inspection or after a hearing before a Board of Special Inquiry.

9. A table of such cases is appended hereto and made a part hereof, being denominated as Exhibit B.

10. None of the files involving the aforementioned 40 cases contains any allusion to the existence of any contemporaneous or prior blood-test. As a matter of administrative practice, your deponent assumes that, had the examining authorities been aware of the existence of any prior blood-test, an allusion would be made thereto in the record; for it is the standard practice of all hearing officers, in cases where persons are admitted to the United States after a hearing or examination by Immigration authorities, to cite any evidence which is favorable to the applicant, and which, therefore, tends to support or justify the administrative decision admitting the appli-

cant. Therefore, while it is theoretically possible that (192) in one or two of these 40 cases, the applicant or his parents had been given prior blood-tests by the State Department, the existence of such blood-tests was not relied upon by the respective boards or hearing officers in admitting the applicants.

11. From the foregoing files, cited in Exhibits A and B it should be abundantly clear that, on the one hand, Chinese persons have not been universally blood-tested by the Immigration and Naturalization Service; and that, on the other hand, white persons have not universally escaped blood-testing by reason of any assumed "preference" by the Immigration and Naturalization Service of their particular race or color. Blood-testing of white persons, as noted, has been used in at least 60 cases in the New York Office alone; and, in view of the recent Court decisions upholding the scientific value of blood-testing, it may be assumed that the technique of blood-testing will be applied in an increasing number of cases.

12. If it is suggested by relators that the survey of Chinese-born cases, set forth in Exhibit B, is limited to 1952, the short answer is that the 1952 period represented by the said survey relates to the same period during which the relators herein were blood-tested. Physical limitations of time have prevented your deponent from extending the survey of Chinese-born cases beyond the period represented by Exhibit B. Undoubtedly, of course, the use of blood-testing, both in the case of Chinese-born persons and in the case of non-Chinese-born persons, has, as previously indicated, increased since 1952. However, in a rapid and cursory check of recent cases, your deponent has discovered that there is at

least one fairly recent case (193) where a Chinese-born person was exempted from the requirement of a blood-test. That case is the case of *L-F-G*, File No. A A51355. This particular individual applied for admission to the United States as a derivative citizen, and it appeared that his birth had been registered at the United States Consulate in Canton, China. There being no apparent doubt as to his identity, he was duly admitted without a blood-test, and was thereafter issued a certificate of derivative citizenship at New York. The admission occurred May 19, 1954. The certificate of citizenship was issued without a blood-test on April 26, 1955.

DORRIS E. YARBROUGH

(Sworn to August 22, 1955.)

EXHIBIT "A", ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF DORRIS E. YARBROUGH IN SUPPORT OF RESPONDENT'S MOTION FOR REARGUMENT

(194)

DIGEST OF BLOOD TESTS OF WHITE PERSONS:

File No.	Name	Date of Test	Nationality
VP 3-65428	C.F.	1/10/55	Poland
VP 3-62356	J.B.	1/13/55	
VP 3-65511	S.S.	1/13/55	
VP 3-66412	I.L.	1/17/55	
0300-473507	C.W.S.	1/17/55	Czechoslovakia
VP 3-66330	K.G.	1/25/55	Poland
VP 3-62386	A.W.	1/27/55	Hungary

Exhibit A, Annexed to Supplemental Affidavit of Dorris E. Yarbrough in Support of Respondent's Motion for Reargument

File No.	Name	Date of Test	Nationality
VP 3-65511	M.M.	1/27/55	Poland
VP 3-68545	L.C.	2/8/55	Poland
VP 3-63795	E.L.	2/10/55	Poland
VP 3-65732	I.F.	2/15/55	Poland
0300-471-039	J.L.N.	2/25/55	Russia
VP 3-61027	M.P.	2/25/55	Russia
VP 3-55877	G.L.	3/9/55	Germany (E. Russia)
VP 3-70384	A.F.	3/9/55	Kiev–Russia
VP 3-69662	H.M.	3/22/55	E. Poland (W. Ukraine)
VP 3-69939	Z.I.S.	3/23/55	Russia
VP 3-69058	R.N.	3/24/55	Poland
VP 3-69986	E.W.	4/13/55	Poland
VP 3-65386	H.I.	4/15/55	Iraq
VP 3-61350	M.B.	4/18/55	Poland
VP 3-68358	P.L.	4/18/55	Asia Minor Turkey
VP 3-71461	E.D.	4/19/55	Czech
(195)			
VP 3-70112	H.R.	4/19/55	Hungary
VP 3-70877	F.L.	4/21/55	Poland
VP 3-67370	L.N.	5/2/55	Iraq
VP 3-54231	A.A.	5/2/55	Czech
VP 3-67634	A.A.	5/2/55	Czech
VP 3-71563	J.M.	5/2/55	Poland
VP 3-70493	A.C.	5/3/55	Russian
VP 3-71525	H.C.	5/3/55	Russian
VP 3-65111	R.W.S.	5/3/55	Hungary
VP 3-72838	A.W.	5/4/55	Czech
VP 3-71318	J.G.	5/4/55	Poland
VP 3-70231	J.Z.	5/4/55	Czech
VP 3-1-77155	S.R.	5/11/55	Hungary
VP 3-1-71363	A.Z.	5/17/55	Poland
VP 3-69755	H.M.	5/23/55	Iraq
VP 3-70649	J.S.	5/27/55	Poland
VP 3-1-71174	M.K.	6/6/55	Poland
VP 3-1-71476	M.K.	6/6/55	Poland
VP 3-1-76584	R.M.	6/6/55	Poland
VP 3-71468	I.L.	6/6/55	Ukraine

Exhibit A, Annexed to Supplemental Affidavit of Dorris E. Yarbrough in Support of Respondent's Motion for Reargument

File No.	Name	Date of Test	Nationality
VP 3-75973) VP 3-73828)	E.R.	6/7/55	Poland
VP 3-1-72410 (196)	F.H.D.	6/7/55	Iraq
VP 3-70398	B.S.	6/14/55	Poland
VP 3-71250	J.S.	6/14/55	Poland
VP 3-1-75286	R.M.	6/16/55	Poland
VP 3-1-74712	A.S.	6/16/55	Poland
VP 3-71832-I	R.F.	6/16/55	Russia
VP 3-70708	B.W.	6/23/55	Poland
VP 3-1-73467	J.M.	6/23/55	Poland
VP 3-1-77373	R.L.C.	6/23/55	Poland
VP 3-1-77523	V.A.	6/23/55	Hungary
VP 3-73535-I	C.H.	6/23/55	Czech
VP 3-1-76983	C.M	6/24/55	Poland
VP 3-1-76699	E.N.	6/24/55	Poland
VP 3-1-65091	G.M.	6/24/55	Czechoslovakia
VP 3-I-77997	P.S.	7/8/55	Poland
VP 3-I-74374	K.K.K.	7/20/55	Turkey–Armenian
VP 3-77663	B.W.H.	8/4/55	Russia

EXHIBIT "B", ANNEXED TO SUPPLEMENTAL AFFIDAVIT OF DORRIS E. YARBROUGH IN SUPPORT OF RESPONDENT'S MOTION FOR REARGUMENT

(197)

DIGEST OF ADMISSIONS OF CHINESE WITHOUT BLOOD-TESTING BY I & N S

File No.	Name	Date of Admission
0300-415 543	NYG	3/31/52
0300-415 057	LCF	4/24/52
0300-414 739	CSH	3/27/52

Exhibit B, Annexed to Supplemental Affidavit of Doris E. Yarbrough in Support of Respondent's Motion for Reargument

File No.	Name	Date of Admission
0300-414 740	MY	3/27/52
0300-414 620	HSM	3/19/52
0300-414 619	FGS	3/25/52
0300-414 600	CKK	3/14/52
0300-416 709	YLT	4/25/52
0300-416 712	YWW	4/25/52
0300-416 998	MS	6/6/52
0300-417 252	YSQ	4/9/52
0300-418 989	CJM	4/30/52
0300-419 180	LYY	5/5/52
0300-418 875	LKW	5/20/52
0300-418 707	LSF	4/21/52
0300-418 764	LJ	5/13/52
0300-418 268	(WYQ	4/11/52
	(WDT	4/11/52
0300-522 833	LSM	6/16/52
0300-418 244	NKS	4/25/52
0300-418 312	CTN	5/8/52
0300-419 861	CSQ	5/9/52
0300-420 203	SKB	5/2/52
0300-419 639	NKD	5/20/52
0300-419 653	(WWH	5/2/52
	(WWG	5/2/52
0300-422 284	TSY	6/5/52
0300-420 283	TSJ	6/5/52
0300-422 141	NTG	6/16/52
0300-417 96F	NSJ	4/24/52
0300-419 300	JKS	4/24/52
0300-419 265	JKY	4/24/52
0300-419 301	WEH	4/17/52
0300-421 287	CYG	5/23/52
0300-419 616	HJP	5/16/52
0300-416 992	CTL	4/21/52
0300-416 437	SHM	5/7/52
0300-415 901	LKL	4/23/52
0300-415 871	LWG	3/27/52
0300-419 913	GKW	6/2/52

Supplemental Affidavit of A. J. Nicholas in Support of Respondent's Motion for Reargument

(198)

DISTRICT OF COLUMBIA
CITY OF WASHINGTON

SUBJECT: BLOOD TEST PROCEDURES USED IN PROCESSING APPLICATIONS FOR UNITED STATES PASSPORTS

The blood test procedure was initiated in passport cases in the latter part of 1951 under the following circumstances:

(1) Experience showed that the percentage of fraud in certain types of Chinese derivative cases was upwards of 50%;

(2) In the type of case involved the applicant professed inability to present the normal type of documentary evidence commonly presented in other derivative cases;

(3) Inability of the Government to conduct investigations in the area from which the applicants originated; namely, Kwangtung Province, China;

(4) In some borderline cases it was felt that compatible blood test reports could be used as affirmative evidence in favor of the applicants in the absence of other reliable documentary evidence.

In January 1953, the Department checked the operation of the blood-testing program and ascertained that of the total number of applications processed abroad in the previous six months period in derivative Chinese cases 44% were disapproved because of incompatible blood

tests. Inasmuch as the blood test procedure then in effect, which covered only the blood grouping and blood typing, was only 50% effective as a fraud detection procedure, it was obvious that the number of actual frauds in the number of cases processed in that period ran between 80% and 90%.

Instructions were sent to all Consular Posts throughout the world in 1953, authorizing the use of blood tests, radiological examinations and physical examinations in cases where the circumstances indicated a doubt as to the citizenship and paternity of an applicant. No restrictions as to racial origin were indicated. This procedure, although mainly used (199) in Chinese derivative cases, is used and has been used in cases of applicants other than those of Chinese origin.

The procedure is not used in all cases of derivative Chinese. It is estimated that since August 1952 this Department has issued approximately 6000 United States passports to persons of the Chinese race who have claimed citizenship derivatively. Of this number about 850 were requested to undergo blood testing. The remaining number--5150—were processed and documented without this requirement.

Compatible blood test reports have been used by the Department in certain cases as affirmative evidence of favor of the applicants.

A. J. NICHOLAS
A. J. Nicholas
Assistant Director
Passport Office
Department of State

(Subscribed and sworn to August 19, 1955.)

Reply Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument

(169)

[SAME TITLE]

State of New York,
County of New York—ss.:

BENNY GIM, being duly sworn, deposes and says:

I received copies of the supplemental affidavits of Dorris E. Yarbrough, sworn to on August 22, 1955, and A. J. Nicholas, sworn to on August 19, 1955, after my answering affidavit was submitted on the return of the respondent's motion. This affidavit answers the new contentions set forth in the supplemental affidavits.

Investigator Yarbrough's affidavit asserts that in 1952 he inaugurated blood tests in this district for Chinese born persons claiming derivative United States citizenship, that because of charges of discrimination he has maintained a record of blood tests given to white persons in 1955 and that a recent survey, made for purposes of this case of 124 files of Chinese born persons arriving and admitted between March 1, 1952 and September 30, 1952, indicates that 40 were admitted without blood tests. Each of these statements in Investigator Yarbrough's affidavit will be considered in turn.

Investigator Yarbrough's first statement to the effect that he inaugurated blood tests in this district is (170) rather surprising new evidence in view of the last decision of Special Inquiry Officer Maltin of January 18, 1955 in this case to the effect that blood tests were inaugurated by the independent action of Chairman of Boards of Special Inquiry to assist them in their decisions (pp. 3-4). At the last administrative hearing in this case,

which concluded on December 10, 1954, upon which the Court's decision was based, Investigator Yarbrough was not called as a witness by the Government to testify to the facts which it now seeks to supply belatedly to the effect that some time ago he commenced to maintain a record of blood tests given to white persons. On the contrary, the Government witness at the hearing, Lester Friedman, Esq., testified that he caused a survey to be made of the entire Immigration Service, and discovered that there was no statistical data maintained on cases in which blood tests were used (p. 78).

The statement of Investigator Yarbrough that 60 white persons have been given blood tests commencing January 10, 1955, after the prior discriminatory practice was criticized by this Court in its decision of August 31, 1954, as unconstitutional, is wholly irrelevant to the unconstitutional blood test practice beginning in June or July, 1952, which has been proved in this case. It is significant that Mr. Yarbrough has not cited a single case of a white person who was blood tested in June or July of 1952 and for a reasonable length of time following that period. This newly devised practice of blood testing white persons following this Court's decision of August 31, 1954 appears to be an effort to cure retroactively the former discriminatory practice of blood testing only Chinese persons. Obviously it cannot cure the prior unconstitutional practice and supplies no basis (171) whatever for a rehearing. In that connection, it should be noted that Mr. Friedman admitted that the early directives of the Immigration Service in visa petition cases did mention the use of blood tests specifically for Chinese persons but was later amended sometime in 1954 to delete any reference to race (p. 108).

Reply Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument

Investigator Yarbrough's statement that a recent survey of 124 cases of Chinese persons admitted between March 1 and September 30, 1952 indicates that 40 were admitted without blood tests is also irrelevant and immaterial to the issue in this case. It will be noted that most of these persons were admitted during the first part of the period involved before blood tests for all Chinese applicants was officially commenced. Moreover, the date of admission no doubt is the date of the final determination of admission and is not the earlier date of the arrival of the applicants at which time they would be examined by the Immigration Service. Dr. George F. Cameron of the United States Public Health Service testified in this case (pp. 61-63) that he did not start blood testing until June 1952. It is obvious that a number of Chinese may have escaped blood testing in March, April and May, or even in June, before the mechanics for blood testing were devised and before the practice became uniformly established as it was at the time that the relators in this case were blood tested in July and August 1952. Dr. Cameron testified that when he began blood testing in June 1952 he was directed to blood test only Chinese and that he did not blood test any white persons. It is submitted therefore that Exhibit B annexed to Investigator Yarbrough's affidavit is of no assistance and supplies no basis whatsoever for a rehearing. Moreover, the statement that one Chinese *recently* was not (172) blood tested obviously has no bearing on the uniform practice of blood testing all Chinese which was proved to exist commencing in June 1952.

The affidavit of A. J. Nicholas merely states that since August 1952 6,000 passports were issued to persons of

the Chinese race claiming citizenship derivatively and of these only 850 were requested to undergo blood tests. No facts are given to indicate whether or not the 5150 were all persons who had been living in the United States for many years and who may have had passports on several prior occasions and were seeking passports merely for visits abroad and whether all of the 850 who were blood tested were persons abroad seeking to come to the United States for the first time. In any event, this affidavit supplies no relevant evidence on the practice of the Immigration and Naturalization Service of blood testing only Chinese applicants for admission beginning in or about June, 1952.

The respondent's motion to reopen this case does not in any respect establish that the Court's decision is erroneous but merely seeks to evade the effect of the unconstitutional procedure which has been proved in this case by alleging the use of a somewhat different procedure at a wholly subsequent time. It is submitted that the respondent cannot change the facts concerning the prior unconstitutional practice by this alleged recent reform which is brought forward only after this Court's final decision has been rendered. It would be more appropriate for the respondent to bring forth this evidence in a new case where admission is sought at the present time and it is charged that blood testing is applied presently in a racially discriminatory manner. Such evidence cannot be made applicable to the present case.

BENNY GIM
Benny Gim

(Subscribed and sworn to August 23, 1955.)

Reply Affidavit of Harold J. Raby in Support of Respondent's Motion for Reargument

(206)

[SAME TITLE]

State of New York
County of New York
Southern District of New York—ss.:

HAROLD J. RABY, being duly sworn, deposes and says:

(1) In the answering affidavits submitted by relators' counsel, reference is made to Mr. Friedman's past assertions that blood-testing of Chinese-born persons on a large scale was the result of the usual lack of documentary evidence supporting pedigree, and the inability to conduct appropriate investigations. Relators' counsel characterizes such assertions as follows:

> "These two justifications were shown on cross examination to be hastily contrived afterthoughts to cover up a classification which in reality was based solely upon race. That such a classification is used by the Immigration Service was all the more conclusively demonstrated by the introduction into evidence of the blood test cases of Hong Kong born Chinese who had birth certificates and who had never been in China, and whose parents had marriage certificates."

(207)

(2) Your deponent submits, on the contrary, that the lack of pedigree documents in China proper and the inability to investigate—circumstances which have brought about a high percentage of fraudulent claims of citizenship by Chinese born persons—are self-evident justification for the use of such blood tests; and these circum-

stances have already been alluded to by the Second Circuit in *Dong Wing Ott* v. *Shaughnessy*, 220 F. 2d, 537, as the basis of its unqualified approval of the use of such blood tests in Chinese cases.

(3) Moreover, the good faith of these assertions is in no way disproved (as relators' counsel seems to assert) by proof that, in four isolated cases gleaned by counsel, presumably after a careful inquiry of attorneys who had handled Chinese cases, there had been blood testing of Chinese born persons, notwithstanding the availability of blood tests and investigative facilities. Even if it were to be assumed, arguendo, that the insistence of the Government on blood testing in these four individual cases represented individual instances of bureaucratic overzealousness, no general pattern of discrimination can be proved by reference to four cases. Moreover, there may well have been other factors involved in those four cases, not mentioned in the proof submitted by relators, which justify the use of blood tests. It is possible, for instance, that an investigation might have raised doubts as to the authenticity of the documents submitted.

Presumably, for this reason, when a proffer of proof, identical with the proof offered by relators in this case, was made in the *Dong Wing Ott* case, it was rejected as irrelevant by the Board of Immigration Appeals (208) Counsel for Dong Wing Ott, in his subsequent brief for the Court of Appeals, criticized this ruling and contended as relators' counsel contends in this case, that proof of four isolated cases of blood-testing of Chinese equipped with birth certificates "proved" discrimination. The Court of Appeals thought so little of this argument that they did not allude to it. Your deponent submits that, to the extent that Judge Dimock found the Hong Kong

cases to take the case out of the scope of Dong Wing Ott, his Honor misapprehended the scope of that decision; and reargument should be allowed on that basis, independently of the previously-stated grounds for reargument.

(4) Relators' counsel also characterizes, as irrelevant, the assertion of affiant Yarbrough to the effect that there has been blood-testing of white persons in recent months. Your deponent submits that such assertion is highly relevant. Blood-testing in its inception was applied to the Chinese because of the high incidence of fraud in Chinese cases—fraud made possible by the usual lack of documentary proof of pedigree and the lack of investigating facilities. No one could challenge the propriety of blood-testing of Chinese persons per se. In order to spell out discrimination, relators would have to show, by proof that the Immigration Service over a prolonged period of time, continued to use blood-testing solely against the Chinese, despite the fact that it could be used appropriately, in an investigative sense, against non-Chinese persons. Only by such proof could the relators establish an "ab initio" intention on the part of the Service to discriminate against the Chinese; for one certainly cannot charge discrimination in the conduct of a program that has just commenced. Thus, the evidence offered (209 and 210) now by the Government, indicating that white persons are now blood-tested is not only relevant evidence, but is directly responsive to the Court's suggestion that the Government does *not* blood-tests white persons. If the Judge's apparently erroneous belief in this respect was relevant enough to cause him to grant this writ, then certainly the record should be made clear, in this regard

HAROLD J. RABY

(Sworn to August 24, 1955.)

Answering Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument

(173)

[SAME TITLE]

State of New York,
County of New York—ss.:

BENNY GIM, being duly sworn, deposes and says:

This affidavit is submitted in answer to the second supplemental affidavit of Harold J. Raby, Esq., dated August 24, 1955.

Respondent carelessly asserts in the second subparagraph of paragraph (3) of his affidavit that counsel in the Dong Wing Ott case, in arguing the issue of discrimination, offered proof which was "identical" with the proof contained in relators' exhibits 27 through 30; that *in his brief* for the Court of Appeals counsel contended that proof of four blood test cases of Chinese having birth certificates proved discrimination; and that the Court of Appeals thought so little of this argument that they did not allude to it. Therefore, respondent says, this Court misapprehended the scope of the Dong decision in deciding that the Hong Kong cases made the case at bar distinguishable from the Dong decision.

An examination of the file of the Dong Wing Ott (174) case (Circuit Court of Appeals Clerk's file #23307-08) reveals that respondent's assertions above described indicate an incredible indifference to the actual facts in that case. On pages 91 through 94 of the administrative hearing record, (Appellant's Appendix pp. 75-81) there was a colloquy between counsel and the Special Inquiry Officer in which counsel requested the Immigration Service to produce several files for his examination so that he may

find proof regarding the issue of discrimination. One of the files requested bears the same name as the person mentioned in exhibit 30. The Special Inquiry Officer refused to produce such files. Counsel did not at any time during those hearings introduce any evidence, whatsoever, either by way of testimony or documents, concerning the blood testing of Hong Kong born Chinese. Similarly, an examination of the Dong Wing Ott brief filed in the Court of Appeals on December 16, 1954, does not contain any references to or arguments concerning the blood testing of Hong Kong born Chinese. The pertinent extract of the administrative hearing in the Dong case and a copy of the Dong brief in the Court of Appeals (see pages 18-26 therein) are attached herewith for this Court's examination.

It is clear that the Court of Appeals in the Dong case was unaware of the fact that Chinese applicants born and living in Hong Kong, being in possession of all necessary documentation, and who have never been to China, were also blood tested by the Immigration Service. Consequently, the Court of Appeals was persuaded by the government to believe that the alleged justifications of the absence of birth certificates and the inability of the Consulate to investigate areas of a person's birth were really the reasons why blood (175) tests were imposed upon Chinese persons and not others.

However, in the case at bar, as this Court properly noted, the fact that exhibits 27 through 30 show that Chinese born and living in Hong Kong, being duly documented, were nevertheless blood tested demonstrates that the alleged justifications aforementioned for the imposition of the blood tests were devised as an afterthought to cover up the real justification—namely one of race.

Moreover, the constantly shifting position of the Immigration Bureau witness as to which of the alleged justifications for blood tests—birth certificates or feasibility of a consular investigation—was the primary justification therefor points up that both of these justifications were newly invented. Early in this case, the justification for blood tests was placed solely on the lack of birth certificates, then later, birth certificates were minimized as a factor, and the primary criterion for the imposition of blood tests was the feasibility of a consular investigation. When, being forced to admit that this latter criterion was left out of his earlier affidavits, the witness again sought to bolster the importance of birth certificates, stating that it was "(e)xtremely important" (R. 119). However, in his affidavit of December 23, 1953, and in his second brief, *he had stated just the reverse*, saying that the presence of birth certificates was *only one, and perhaps the least important factor* in determining the necessity of blood tests. (See page 120 of the hearing record and page 17 of the second brief of respondent.)

Respondent next tries to overcome the importance of the four Hong Kong born Chinese cases by (1) calling them "isolated" and (2) speculating darkly that there were "other factors" involved which required blood tests, notwithstanding the feasibility of a consular investigation and the presence (176) of all necessary documents.

It should be pointed out that these four cases were introduced at the hearing, and the Immigration Service witness was challenged to cite one single case of a Chinese person, regardless of documentation, who had been exempted from a blood test. He admitted that he did not know of the existence of any such case (R. 144), although he had testified that he acquired expert knowledge of

Chinese cases by reviewing hundreds of files and by having extensive conferences with investigators who had handled many thousands of Chinese cases (R. 143).

While the Immigration Service had full opportunity to do so, they did not at any time prior to respondent's present affidavit attempt to prove that these cases were "isolated", although if such had been the fact, the Service could have done so, since they are in exclusive possession of all the files of Chinese persons.

That these four Hong Kong born cases may be a uniform rather than isolated pattern, is indicated by exhibit 31. This was a case which came to counsel's attention after the hearing of December 10, 1954 and prior to the last argument before the Board of Immigration Appeals. It was therefore introduced and accepted into evidence by the Board. This case also involved an applicant, born and living with his mother in Hong Kong. His father was a naturalized American citizen who married his mother in Hong Kong before the American Consul who issued a Consular Marriage Certificate. Before the applicant was born, the American Consul was advised orally by the mother and by letters that she was pregnant and expecting a child. When the applicant was born, a birth certificate was presented. Still, a blood test was (177) required in this case.

As to the dark inferences that all the facts concerning exhibits 27 to 30 had not been brought out by relators, it would be well to examine the record. In these exhibits, relators presented every important fact known about them and introduced them into evidence and specifically asked the Special Inquiry Officer to verify the facts and add any necessary statement to the exhibits which he thought appropriate (R. 126). The Special Inquiry Officer stated

Answering Affidavit of Benny Gim in Opposition to Respondent's Motion for Reargument

"I also will look at the files referred to as exhibits 27 through 30 and I may or may not comment on that in my decision, depending upon whether anything important is discovered by my examination which might lend a little more light to the statements set forth in those exhibits * * *".

In view of this statement and in view of the facts that these files are within the possession of the Service, it is doubly significant that in his decision of January 18, 1955, the Special Inquiry Officer did not mention, explain, justify, or attempt to alter, amend or amplify any of the statements in any of the exhibits. The conclusion is inescapable that the facts given in those exhibits are accurate and complete in their entirety.

We turn next to the assertions in paragraph (4) of respondent's affidavit. Affiant Yarbrough's claim that 60 white persons have been blood tested between January and June of 1955 is clearly irrelevant to the issue of whether relators were discriminated against in blood test procedures in effect in July and August of 1952.

This Court in its decision of August 31, 1954, condemned racial discrimination and directed the taking of evidence with respect to the requirement of blood tests for (178) Chinese and the ommission of such requirement for persons of other races. The fact that the first blood test involving a white person did not occur until more than three months after this Court's decision suggests strongly that the Immigration Service, with this decision in mind, attempted to cure retroactively a discriminatory practice imposed upon Chinese, beginning about June, 1952.

Of greater significance is the fact that affiant Yarbrough does not cite any cases involving white persons blood tested in July or August, 1952 (at which time relators were blood tested), or for any reasonable period follow-

ing that date. If a need existed, presumably because of lack of documents and the unavailability of a consular investigation, for blood testing white persons in 1955, surely such need must have existed for blood testing at least some of the white person applicants in 1952 and 1953. Yet, after what appears to be a careful dredging of Immigration files, respondent has failed to show any cases of white persons blood tested in 1952, 1953, or even as late as 1954.

In summary then, it seems from all three of respondent's affidavits, their request for a rehearing at this late date, is based upon a claim of blood tests for 60 white persons in 1955 and the claimed non-imposition of blood tests for 40 Chinese persons in the early months of 1952, which was obviously prior to the time when formal blood test procedures were prescribed for all Chinese (R. 61, 62, 63). None of these cases is either germane or relevant to the issue of whether there was a discriminatory blood test procedure in effect in July and August 1952, when the relators were blood tested.

In conclusion, it is regrettable that respondent, after three carefully considered opinions of this Court in (179) this case, in the course of proceedings covering a period of more than three years, seeks a rehearing upon irrelevant evidence, and, if that fails, a retrial of all the issues by affidavits. If respondent believes that he has evidence to show that relators are not entitled to admission to this country, the proper remedy is not a motion for rehearing, but he should institute warrant and deportation proceedings (See Ex parte *Chin Sue Wei*, 272 F. 480).

S/ BENNY GIM
Benny Gim

(Sworn to August 26, 1955.)

Order Filed October 5, 1955, Sustaining Writ

(200)

[SAME TITLE]

A writ of habeas corpus, heretofore issued on July 13, 1953, having come on to be heard before this Court on July 28, 1953, and Messrs. Hong & Gim (Benny Gim, of Counsel), attorneys for relators, having been heard in support of the writ, and J. Edward Lumbard, Esq., United States Attorney for the Southern District of New York (Harold Raby, Assistant United States Attorney, of Counsel), attorney for respondent, having been heard in opposition thereto, and due deliberation having been had, and upon reading and filing the petition for the writ of habeas corpus verified on July 10, 1953, and the Court having, on September 17, 1953, filed its decision dated September 17, 1953, and upon the motion for reargument of said writ of habeas corpus having been made by the respondent on September 30, 1953, and due deliberation having been had, and the Court having denied said motion for reargument by its decision dated October 7, 1953, which was filed on October 9, 1953; and

Upon the order of this Court of October 16, 1953, and upon the reopened proceedings before the Special Inquiry Officer of the Immigration and Naturalization Service on (201) November 30, 1953, and upon reading the transcribed record of the said proceedings, and the Court having rendered its second decision dated August 31, 1954, and upon the second reopened proceedings before the Special Inquiry Officer of the Immigration and Naturalization Service and the proceedings before the Board of Immigration Appeals, and upon the transcribed record

Order Filed October 5, 1955, Sustaining Writ

of those proceedings, and due deliberation having been had,

Now, on motion of Hong & Gim (Benny Gim, of Counsel), attorneys for relators, it is

ORDERED that the writ of habeas corpus is hereby sustained and the relators be forthwith released and discharged from the custody of the respondent, and admitted into the United States as citizens thereof, and it is further

ORDERED that the administrative parole of the relators under bond be terminated forthwith and said bond be returned to the relators.

Dated: New York City, New York
October 5, 1955

E. J. DIMOCK
U. S. D. J.

Respondent's Amended Notice of Appeal

(204)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ–86-269

UNITED STATES OF AMERICA, ex rel. LEE KUM HOY, LEE KUM CHERK and LEE MOON WAH,

Relators,

—against—

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service, New York District,

Respondent.

Sirs:

PLEASE TAKE NOTICE that the respondent, above-named, hereby appeals to the United States Court of Appeals for the Second Circuit:

(A) From the final decision and order entered in this proceeding on the 8th day of August, 1955, wherein it was ordered and adjudged that the writ of habeas corpus herein be sustained, and from each and every part of said decision and order; and

(B) From the order entered on the 5th day of October, 1955, in which it was adjudged that the writ of habeas corpus be sustained and that the relators be forthwith released and discharged from the custody of respondent and admitted into the United States as citizens thereof, and from each and every part of said order; and

(C) From the interlocutory decision and order entered September 1, 1954, wherein it was ordered and adjudged that the writ of habeas corpus herein be sustained unless the relators were granted a new hearing before a Board of Special Inquiry of the Immigration & Naturalization Service "for the purpose of (a) the introduction of evidence with respect to the requirement of blood grouping tests in the cases of persons of the Chinese (205) race and the omission to require blood grouping tests under similar circumstances in the cases of persons of other races; and (b) the determination upon such evidence, of the issue of discrimination"; and

(D) From the order entered on or about the 27th day of September, 1955 denying the respondent's motion for reargument of the aforementioned decision and order of August 8, 1955, sustaining the writ of habeas corpus.

Dated: New York, N. Y., October 6, 1955.

Yours, etc.,

PAUL W. WILLIAMS,
United States Attorney,
Southern District of New York,
Attorney for Respondent.
Office and Post Office Address:
United States Court House,
Foley Square,
Borough of Manhattan (7).
City of New York.

Respondent's Amended Notice of Appeal

To)—

HONORABLE WILLIAM V. CONNELL,
Clerk,
United States District Court
Southern District of New York,

HONG & GIM, Esqs.,
Attorneys for Relators,
24 Pell Street,
New York 17, N. Y.

Relators' Notice of Cross-Appeal

(211)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ–86-269

UNITED STATES OF AMERICA, ex rel. LEE KUM HOY, LEE KUM CHERK and LEE MOON WAH,

Relators,

—against—

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service, New York District,

Respondent.

Notice is hereby given that Lee Kum Hoy, Lee Kum Cherk and Lee Moon Wah, relators above named, hereby cross-appeal to the United States Court of Appeals for

the Second Circuit from the decision of August 31, 1954, the order thereon of October 4, 1954, and the final decision of August 8, 1955 and the final order thereon dated and entered on October 5, 1955, insofar as they incorporate the prior decision and order, on the ground that the Court erroneously held that the officers of the Immigration and Naturalization Service could without statutory authority constitutionally compel relators and their parents to submit to blood tests and order their exclusion from the United States solely on the basis of such tests, and on the further ground that the Court's holding that relators could have been excluded solely on the basis of inaccurate, conflicting and scientifically discredited blood tests was a denial of due process of law. The United States Attorney for the Southern District of New York is the attorney of record for the above named respondent.

Dated: New York, N. Y.
October 7, 1955

HONG & GIM
551 Fifth Avenue
New York, N. Y.
(Ben Gim, of Counsel)

EDWARD J. ENNIS
165 Broadway
New York, N. Y.

Attorneys for Relators

To:

PAUL WILLIAMS, Esq.
U. S. Attorney
So. Dist. N. Y.

Stipulation and Order

(212)

[SAME TITLE]

Whereas, on or about October 6, 1955 an order was entered in this Court (per Honorable Edward J. Dimock, District Judge), directing that the writ of habeas corpus be sustained; and

Whereas, the respondent intends to appeal from said order to the United States Court of Appeals for the Second Circuit; now therefore, it is

STIPULATED AND AGREED, pursuant to the requirements and provision of Rule 49 of the Rules of the United States Supreme Court, that the relators above-named be released and enlarged upon their own recognizance, without surety, pending the hearing and determination of the respondent's appeal to the said United States Court of Appeals for the Second Circuit.

Dated: New York, N. Y., October 6, 1955.

BEN GIM.
Hong & Gim,
Attorneys for Relators.

PAUL W. WILLIAMS,
Paul W. Williams,
Attorney for Respondent.

SO ORDERED:

October 6, 1955.

JOHN W. CLANCY

.....

U. S. D. J.

PART II. EXCERPTS FROM RECORD OF ADMINISTRATIVE PROCEEDINGS

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

MC—130

Names of Aliens:

LEE, KUM HOY 21 M
LEE, KUM CHERK 13 M
LEE, MOON WAH 12 F

Claim U. S. Citizenship—Chinese

0300-423, 253-4-5

Record of Hearing before a Board of Special Inquiry held at Ellis Island, New York Harbor, N. Y.

August 14, 1952. 1:15 P. M.

Present: Insp. S. Bernsen, (Chairman)
Act. Insp. J. J. Monahan,
Secy-Member M. Ciepka.
Intr. C. H. Yung. (Chinese)

Counsel: Samuel Bernstein, Esq.,
551 Fifth Avenue,
New York, N. Y.
Telephone: MU-7-8113

Arrived Trans-Canada Airlines Flight CF-TFV 324/7, June 17, 1952.

Made SI from TD—Sect. 13(a)(1) Act of 1924; Executive Order 8766 of June 3, 1941, July 22, 1952—Insp. L. C. Joseph.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

Insp. Bernsen to all applicants, who testified in the Chinese language, through Interpreter:

Q. What are your names? A. (By older male applicant)—Lee Kum Hoy.
(By younger male applicant)—Lee Kum Cherk.
(By female applicant)—Lee Moon Wah.

Q. You are informed that you have been referred to this Board of Special Inquiry to be heard on your application for admission to the United States and the burden of proof is upon you to establish that you are not inadmissible under any provision of the immigration laws. Do you understand? A. (By each applicant) Yes.

Q. In this proceeding you may be represented by counsel of your own selection, at your own expense, which counsel may be an attorney at law or any other person authorized to practice before this Service. You may also have present a relative or friend, provided if such relative or friend is to testify as a witness in your behalf, his testimony has first been completed. Do you understand? A. (By each applicant) Yes.

Q. Do you wish to be represented by counsel? A. (By each applicant) Yes.

Insp. Bernsen to Counsel:

Q. Counsel, will you please identify yourself for the record? A. Samuel Bernstein, 551 Fifth Avenue, New York City. Admitted to practice before the Service and the Board of Immigration Appeals August 24, 1944.

Insp. Bernsen to all applicants, through Interpreter:

Q. Do you wish to have a relative or friend present under the conditions described? A. (By each applicant) No.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

Insp. Bernsen to all applicants, through Interpreter; and Counsel:

Q. Are you ready to proceed with hearing at this time? A. (By each applicant) Yes.
(By Counsel) Yes.

Insp. Bernsen to all applicants, through Interpreter:

Q. Will you please stand and raise your right hands to be sworn? (All comply). Do you solemnly swear that the testimony you will give will be the truth, the whole truth, and nothing but the truth, so help you God? A. (By each applicant) I do.

Q. You are warned should you give false testimony in this proceeding you may be subject to prosecution for perjury the penalty for which upon conviction may be imprisonment for five years, a fine of $2,000, or both. Do you understand? A. (By each applicant) Yes.

Q. What are all the names by which each of you has been known, and what are your dates and places of birth? A. (By older male applicant)—My given name is Lee Kum Hoy; my marriage name is Lee Wing Bit. I was born C. R. 19-7-16 in the Fung Gong Village, Toishan District, China.
(By younger male applicant)—My given name is Lee Kum Cherk; I have no other names. I was born C. R. 28-4-1 in the Lung Woy Village, Toishan District, China.
(By female applicant)—My given name is Lee Moon Wah; I have no other names. I was born C. R. 29-5-15 in the Lung Woy Village, Toishan District, China.

Q. Were all three of you questioned by an Immigration

officer at Ellis Island on July 15, 1952? A. (By each applicant) Yes.

Q. A record of the testimony which you gave at that time is before this Board. Do you understand? A. (By each applicant) Yes.

Q. Was all the testimony which each of you gave on July 15, 1952 true and correct? A. (By each applicant) Yes.

Lee Kum Cherk and Lee Moon Wah excused from Hearing Room.

Lee Kum Hoy (older male applicant) remains.

Insp. Bernsen to Lee Kum Hoy, through Interpreter:

Q. You have testified that there were always five rooms in the house in which you lived in Lung Woy Village. Is that correct? A. There used to be another small room inside of each kitchen.

Q. How many rooms was that altogether? A. That would make four bedrooms, two kitchens, and one parlor.

Q. In what part of each kitchen was that small bedroom? A. The front part of each kitchen was partitioned off and was made into a room.

By Counsel: Mr. Bernsen, do I understand you are now referring to the question and answer statements taken of the applicants at the primary inspection. If so, I desire to have a copy of the primary inspection examination for my perusal and examination.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

By Insp. Bernsen: You will not be shown a copy of any of the Government records in this case unless they are placed in evidence.

By Counsel: I respectfully except to the ruling of the Board.

Insp. Bernsen to Lee Kum Hoy, through Interpreter:

Q. Who slept in the bedrooms in the front part of each kitchen? A. No one slept in that partitioned room in the large door kitchen—that space was used for storage. My brother, Lee Kum Ark and I used to sleep in the partitioned off room in the small door kitchen.

Q. You testified in your examination on July 15, 1952 that there were only two windows in the entire house in Lung Woy Village. Is that correct? A. Yes.

Q. Are each of those windows—double windows or single windows? A. Single windows.

Q. Were there ever more than two outside windows in that house? A. No.

Q. Were there any additional windows in the house during the time part of each kitchen was used as a bedroom? A. There was a small opening in each kitchen but they had been covered over.

Q. When were they covered over? A. At the time when the partition was taken off.

Q. When was that? A. Ten odd years ago; I don't recall the exact year.

Q. Are there any shutters on the outside windows of each bedroom? A. Yes.

Q. Of what are those shutters made? A. Metal.

Q. Are there any shutters on the inside part of those two windows? A. No, except the five vertical iron bars.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

Q. Where are those five vertical iron bars—on the inside or the outside of the windows? A. Inside—the shutters are outside.

Q. Are you sure the shutters are made of metal? A. Yes.

Q. Have the shutters ever been made of anything else? A. Not that I can remember.

Q. What is the color of the iron bars? A. Green.

Q. Are they bright green? A. Light green—like that (pointing to fairly bright green desk blotter).

Q. And what is the color of the shutters? A. About the same color.

Q. Was there ever more than one skylight in any of the rear bedrooms? A. No.

Q. Are the skylights single skylights or double skylights? A. Single.

Q. When your brother Lee Kim Ark came to the United States in December, 1939, he gave a somewhat different description of your house. Can you think of any reason why his description should disagree with yours? A. What I have stated is what I saw in my house. My brother came to the United States in C. R. 28 and that was quite a long time ago, and he may not be able to remember that far back.

Q. Has the mud wall in front of your village always been there as far as you can remember? A. Yes.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

LEE KUM HOY dismissed from Hearing Room. LEE KUM CHERK (younger male applicant) called.

Insp. Bernsen to LEE KUM CHERK, through Interpreter:

Q. When you were questioned by the Immigration officer on July 15, 1952 you stated there were two outside windows in your house in Lung Woy Village. Is that correct? A. Yes.

Q. Were there any shutters on either of those two windows? A. Yes.

Q. Of what were those shutters made? A. Metal.

Q. Were there any bars on either of those windows? A. Yes.

Q. Of what were the bars made? A. Metal; they were vertical.

Q. How many were there? A. Four or five.

Q. What was the color of the bars? A. They are painted green.

Q. What was the color of the shutters? A. Green.

Q. Do you know whether part of either kitchen in your house was used as a bedroom? A. No.

Q. Do you know if any part of either kitchen in your house was used as a storage room? A. No.

LEE KUM CHERK dismissed from Hearing Room. LEE MOON WAH (female applicant) called.

Insp. Bernsen to LEE MOON WAH, through Interpreter:

Q. How many outside windows are there in your house in Lung Woy Village? A. Two. There are also two

windows on the inside wall; each bedroom has one inside window facing the parlor.

Q. Are there any shutters on the outside windows? A. Yes.

Q. Is there any other protection on the outside windows? A. Iron bars.

Q. What are the shutters made of? A. Iron.

Q. What is the color of the shutters? A. Green.

Q. What is the color of the iron bars? A. Also green, but the iron bars look much greener.

Q. Which are outermost—the bars or the shutters? A. The bars are inside and the shutters are outside.

Q. Can the shutters be closed from the inside of the house? A. Yes. I would just push my hand through the iron bars and close the shutters.

LEE MOON WAH dismissed from Hearing Room. LEE KUM CHERK (younger male applicant) recalled.

Insp. Bernsen to LEE KUM CHERK, through Interpreter:

Q. Which is the outermost—the shutters or the bars on the windows in your house in Lung Woy Village? A. The shutters are on the outside.

Q. Can the shutters be closed from the inside of the house? A. Yes.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

LEE KUM HOY (older male applicant) and LEE MOON WAH (female applicant) recalled.

Insp. Bernsen to all applicants, through Interpreter:

Q. Did all of you arrive in the United States at the Port of New York on June 17, 1952 as passengers on Trans-Canada Airline Flight 324/7? A. (By each applicant) Yes. We left Hong Kong on June 11, 1952 and arrived together.

Q. Did you change planes anywhere enroute? A. (By each applicant) Yes at a place in Canada, but I don't know the name of that place.

Q. What was the name of the transportation company's plane you boarded in Hong Kong? A. (By each applicant) Northwest Airlines.

Q. Were any of you in the United States before June 17, 1952? A. (By each applicant) No.

Q. Have any of you ever had an immigration visa or a permit of any kind to enter the United States? A. (By each applicant) No.

Q. Have any of you a passport or travel document in lieu thereof issued by a foreign country other than the United States to which you owe allegiance? A. (By each applicant) No.

Q. Have any of you been examined by doctors of the United States Public Health Service at Staten Island for the purpose of being given blood tests? A. (By each applicant) Yes.

Q. How many times were you given such examinations? A. (By each applicant) Two times.

Q. There is before this Board a report of each blood test which each of you received. The first blood test for

each of you shows date of request and date of report as July 1, 1952, and contain the following information:

Lee Moon Wah	Blood Type B	Rh Factor + M N
Lee Kum Hoy	Blood Type B	Rh Factor + M N
Lee Kum Cherk	Blood Type O	Rh Factor + N

The report of the second tests for each of you shows date of request, August 11, 1952 and date of report, August 12, 1952, and gives the following information:

Lee Moon Wah	Blood Group B	Rh Type + M N
Lee Kum Hoy	Blood Group B	Rh Type + M
Lee Kum Cherk	Blood Group O	Rh Type + N

Blood tests have also been made of Lee Ha and Hee Tew Wong on each of two occasions by the United States Public Health Service at Staten Island. There is before the Board a report of the blood tests of Lee Ha and Hee Tew Wong showing date of request, July 17, 1952 and date of report, July 18, 1952, with the following information:

Lee Ha	Blood Group A	Rh Type + M
Hee Tew Wong	Blood Group A	Rh Type + M

This Board has also been advised that Mr. George Masterton, Immigrant Inspector has been notified telephonically by the United States Public Health Service at Stapleton, Staten Island, this date, that a re-check was made of the blood tests of Lee Ha and Hee Tew Wong with the following results:

Lee Ha	Blood Group A	Rh Type M N
Hee Tew Wong	Blood Group A	Rh Type M N

The reports of blood tests described are being entered in evidence as Exhibit #1, subject to confirmation by Lee Ha and Hee Tew Wong that they submitted to blood tests

on two occasions. I show you Exhibit #1 and ask if you have any objection to their introduction into the record? A. (By Counsel) I object to the introduction into evidence of the United States Public Health Service reports of blood tests, and I also object to the introduction into evidence of the telephonic report from the United States Public Health Service. Also at this point I request a deferment for an independent examination by an independent medical expert in view of the discrepancies.

By Insp. Bernsen: Counsel, firstly your objection is overruled. Secondly, you are advised that decision will be deferred in this case until you are given an opportunity to have an independent blood check made. However, such blood check will not be accepted unless it is conducted under the supervision of the United States Public Health Service with prior reasonable notice to the Immigration Service. You are further advised that hearing will not be deferred at this time.

Counsel you are also informed that when the second United States Public Health Service blood test reports as to Lee Ha and Hee Tew Wong are received, they will be deemed part of Exhibit #1 if those reports confirm the telephonic report.

By Counsel: I understand—my objection is noted on the record.

Witness, LEE HA, called.

Insp. Bernsen to Witness, Lee Ha, through Interpreter:

Q. What is your name and address? A. Lee Ha, 125 Mott Street, New York City.

Q. Please rise and raise your right hand to be sworn.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

(Complies) Do you solemnly swear that the testimony you will give will be the truth, the whole truth, and nothing but the truth, so help you God? A. I do.

Q. You are warned should you give false testimony in this matter you may subject yourself to prosecution for perjury the penalty for which upon conviction may be five years in a penitentiary or a fine of $2,000 or both. Do you understand? A. Yes.

Q. Is the information you gave as to your name and address correct? A. Yes.

Q. When and where were you born? A. K. S. 33-8-15; Fung Gong Village, Toishan District, China.

Q. Do you know these applicants? A. Yes, they are my children.

Q. Did you testify in connection with their applications to be admitted to the United States on July 16, 1952 at Ellis Island? A. Yes.

Q. Is all the information which you gave at that time true and correct? A. Yes.

Q. You testified on July 16, 1952 there were never more or less than five rooms in your house in Lung Woy Village. Is that correct? A. That is right but in the past there was a partitioned off space in each of the kitchens of my house and that partitioned off space could be considered as a room.

Q. How many outside windows were there in your house in Lung Woy Village? A. At one time there were four, but two of them had been closed in.

Q. Where are the two outside windows which are in existence now? A. One in each bedroom facing the lane.

Q. Are there any shutters on those two outside windows? A. Yes.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

Q. What are those shutters made of? A. Metal shutters, but they had been replaced from time to time.

Q. Were they ever made of wood? A. Yes.

Q. What is the color of the shutters? A. Greenish.

Q. Is there any other protection over the outside shutters? A. Vertical iron bars.

Q. What color are they? A. Greenish. I want to say I am not certain if the shutters were painted red or green, because the shutters of my house had been repainted different colors.

Q. Were you given a blood test by the United States Public Health Service at Stapleton, Staten Island? A. Yes.

Q. How many such blood tests were you given? A. Twice.

Q. A report of that blood test has been received and has been entered in evidence. Do you understand? A. Yes.

Witness, HEE TEW WONG, called.

Insp. Bernsen to Witness, Hee Tew Wong, through Interpreter:

Q. What is your name and address? A. Hee Tew Wong, 125 Mott Street, New York City.

Q. Please rise and raise your right hand to be sworn. (Complies) Do you solemnly swear that the testimony you will give will be the truth, the whole truth, and nothing but the truth, so help you God? A. I do.

Q. You are warned that should you give false testimony in this matter you may subject yourself to prosecution for perjury and upon conviction be liable to a penalty of

imprisonment for five years, or a fine of $2,000, or both. Do you understand? A. Yes.

Q. Is the information you gave as to your name and address true and correct? A. Yes.

Q. When and where were you born? A. K. S. 33-10-18 in Hoi Chu Village, Toishan District, China.

Q. Were you questioned by an Immigration officer at Ellis Island on July 17, 1952? A. Yes.

Q. Was all the testimony you gave at that time true and correct? A. Yes.

Q. Do you know these three applicants? A. Yes, they are my sons and my daughter.

Q. Are they our blood children? A. Yes.

Q. And who is the blood father of these three children? A. Lee Ha.

Q. Were you given a blood test by the United States Public Health Service at Stapleton, Staten Island? A. Yes.

Q. How many times were you given such blood test? A. Two times.

Q. You are informed that the report of these blood tests has been entered in evidence in this case. Do you understand? A. Yes.

Q. According to the second test made by the United States Public Health Service of you, and your alleged husband, and your alleged children, these three applicants, which resulted in a correction of the first test, it is possible under the blood grouping, which this Board will refer to as the "M-N" test, that you and Lee Ha could be the parents of these applicants. Do you understand? A. Yes.

Q. According to the blood grouping test made by the United States Public Health Service which this Board will refer to as the "A-B" test, you and Lee Ha could

not possibly be the parents of Lee Moon Wah and Lee Kum Hoy. Do you understand? A. The applicants are my own children.

Q. Is it your testimony that despite the result of these blood tests Lee Ha is the father of these children? A. Yes.

Q. You will note that the applicants and you and Lee Ha were given blood tests by the United States Public Health Service on two separate occasions, and that although a correction was made in the "M-N" test which shows that the claimed parentage was possible, the results of each separate "A-B" test were the same and show that parentage is impossible as to Lee Moon Wah and Lee Kum Hoy. Do you understand? A. Yes.

Q. And is it your claim nevertheless that these applicants are your blood children by Lee Ha? A. Yes.

Q. Referring to the house in which you lived in the Lung Woy Village was there any sort of protection on the outside window in each bedroom? A. Iron bars and shutters.

Q. What were the colors of the iron bars and shutters? A. Green.

By Insp. Bernsen: There will now be entered in evidence the following exhibits:

Exhibit #2—Pamphlet reprinted from the United States Law Review, December 1936, entitled "Blood Grouping Tests in the New York Courts" by Alexander S. Wiener, M. D.

Exhibit #3—Question and answer statement taken from the applicants and the two witnesses who appeared today bearing dates July 15, 1952 and July 16, 1952 and July 17, 1952.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

Exhibit #4—Boston district file No. 2500/12921 relating to Lee Kim Ark, alleged brother of the applicants.

Exhibit #5—New York district file No. 111/52 relating to Lee Ha alleged father of the applicants.

Exhibit #6—Boston district file No. 2500/11932 relating to Lee Ha alleged father of the applicants.

Exhibit #7—Seattle district file No. 7030/1316 relating to Lee Ha alleged father of the applicants.

Exhibit #8—San Francisco district file No. 1300/76565 relating to Wong Tew Hee, alleged mother of the applicants.

Exhibit #9—Boston district file No. 0200/102559 relating to Wong Tew Hee, alleged mother of the applicants.

Exhibit #10—Seattle district file No. 5359/12-7 relating to Lee Poy, alleged paternal grandfather of the applicants.

Exhibit #11—Seattle district file No. 6386/7-21 relating to Lee Chun, alleged paternal uncle of the applicants.

Exhibit #12—Boston district file No. 0200/57740 relating to Lee Chun, alleged paternal uncle of the applicants.

Exhibit #13—Seattle district file No. 7030/759 relating to Lee Tong, alleged paternal uncle of the applicants.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

Exhibit #14—Seattle district file No. 12210/11-2 relating to Lee Tue, alleged paternal uncle of the applicants.

Exhibit #15—New York district file No. 167/815 relating to Lee Tue, alleged paternal uncle of the applicants.

Exhibit #16—New York district file No. 167/951 relating to Lee Tue Ha, alleged paternal uncle of the applicants.

Exhibit #17—Seattle district file No. 6386/7-25 relating to Lee Tue Kim, alleged paternal aunt of the applicants.

It will be noted that San Francisco File 12025/20037 in the name of a person named Lee Ha does not relate to the alleged father of the present applicants.

It will also be noted that Boston File 0200/102578 in the name of Louie Kim Gook relates to a person who has no family connection with the present applicants and which is not deemed to contain any material relevant to this case. They are therefore not being entered in evidence.

Chicago file 0900/58321 in the name of Lee Tung Wah has not as yet been received by this Board although requested on June 25, 1952.

Insp. Bernsen to Counsel: I show you Exhibits No. 2 to No. 17 inclusive and ask if you have any objection to the introduction of any or all of these Exhibits into the record.

By Counsel: Exception is taken to the introduc-

tion of Exhibit 2 as purely hearsay. This Exhibit contains self-serving declarations, and request is respectfully made for the presentation of Dr. Wiener to confront the witnesses and applicants and to be subjected to cross-examination on the subject matter contained in Exhibit #2 which seems to be confined purely in the main to blood tests in bastardy proceedings and there is nothing contained in Exhibit #2 which appears to be referring to a case such as this. I also request that the doctor of the United States Public Health Service who made the tests be present for examination.

Insp. Bernsen: Your objection is overruled.

By Counsel: Excepted.

Insp. Bernsen to Counsel: Do you have any objections to the introduction into the record of Exhibits #3 and #17 inclusive?

By Counsel: I would like to reserve objection on their entry into the record until I have had sufficient time to read and examine those records and ask for a reasonable period to do so.

Insp. Bernsen to Counsel: You will be given a reasonable opportunity to examine Exhibit #3 to Exhibit #17 inclusive, and note your objections, if any.

Insp. Bernsen: At this time motion is in order to defer decision in this case in order to give Counsel an opportunity to make an independent blood test by a doctor retained in behalf of the applicants under the supervision of the United States Public Health Service with prior notice to the Immigration Service.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

Act. Insp. Monahan: I so move with the proviso that this blood test be taken within ten working days.

By Counsel: I would like to have at least four weeks time. If it can be done within ten days or five days or three days, naturally we will not delay, but I believe ten days is insufficient time to make arrangements with a doctor for the blood tests.

Insp. Bernsen: The Board has heard the objection of Counsel. Does the Board second the motion?

Secy-Member Ciepka: Motion is seconded.

Insp. Bernsen: Unanimous.

Certified that the foregoing consisting of 14 pages is a true and correct transcript of stenographic notes recorded by me.

MARY CIEPKA

17 JJM

Names of applicants:

LEE KUM HOY 21m
LEE KUM CHERK 13m
LEE MOON WAH 12f

Claim U. S. Citizen
Chinese

New York File 0300-423253
0300-423254
0300-423255.

Record of Hearing before a Board of Special Inquiry held at Ellis Island, New York Harbor, New York.

September 18, 1952. 2.40 P.M.

Present: Insps. Sam Bernsen (Chmn)
J. R. Constantine and Secretary-Member
J. J. Monahan.
Mr. C. H. Yung—Chinese Interpreter.

Counsel: Samuel Bernstein, Esq.
551 Fifth Avenue, New York, N. Y.
Telephone: Murray Hill 7-8113.

Deferred August 14, 1952, M. C. page 130.
Minutes of previous hearing made part of this record.

ex T. C. A. Plane Flight 324/17, June 17, 1952.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

By Inspector Constantine: I have familiarized myself with the record to date.

By Inspector Bernsen to applicants, who testified in Chinese through Interpreter C. H. Yung:

Q. What are your names? A. Lee Kum Hoy, Lee Kum Cherk and Lee Moon Wah.

Q. Are you the same Lee Kum Hoy, Lee Kum Cherk and Lee Moon Wah who last appeared before a Board of Special Inquiry at Ellis Island on August 14, 1952, and whose case was deferred? A. Yes.

Q. You are informed that you are all still under oath; do you understand? A. Yes.

By Insp. Bernsen to Counsel:

Q. Do you have any evidence to offer regarding blood tests? A. I should like to withdraw my request previously made for an independent blood test and wish to reiterate my request to cross-examine Doctor Wiener relative to the treatise or pamphlet which was offered in evidence as Exhibit #2.

By Insp. Bernsen to counsel: Your request to have Doctor Wiener appear before the Board for cross-examination is denied.

By Insp. Bernsen to counsel:

Q. Is there any reason why you have withdrawn your request to submit evidence of blood tests? A. After studying the situation with due deliberation I came to the

conclusion that I should first cross-examine Doctor Wiener before offering any independent proof.

By Insp. Bernsen to applicants:

Q. Have any of you had any blood tests taken since last before the Board of Special Inquiry on August 14, 1952? A. (By all three applicants) No.

By Insp. Bernsen to Counsel:

Q. It is noted that you requested a reasonable opportunity to examine Exhibits 3 to 17, inclusive, at the time of your appearance before the Board of Special Inquiry on August 14, 1952; do you now have any objection to Exhibits 3 through 17, inclusive? A. I perused Exhibits 3 to 17, inclusive, and so far as they are not adverse I have no objection to their introduction.

Q. Counsel, you are being requested at this time to state clearly whether or not you have any objection to the introduction of Exhibits 3 to 17, inclusive, into evidence? A. I have no objection so far as they are not adverse.

Q. It is deemed, therefore, that you have no objection to Exhibits 3 to 17, inclusive? A. Yes.

Q. Do you have any additional evidence to present? A. I have two photographs which I should like to offer for your examination and introduction into evidence.

By Insp. Bernsen to older applicant:

Q. Who are the three persons in the foreground of this photograph from left to right? A. I am in the center;

the little girl is my sister, Lee Moon Wah, and the other boy is my brother, Lee Kum Cherk.

Q. When and where was this photograph taken? A. On June 11, 1952, at the Airfield in Kowloon, Hong Kong, on the day that we left there for the United States.

By Inspector Bernsen: The photograph which has just been identified is entered in evidence as Exhibit #18.

By Insp. Bernsen to older applicant:

Q. I now show you the second photograph presented by counsel and ask you to identify the five persons in this photograph from left to right? A. My brother Lee Kum Cherk; myself; my baby son, Lee Chuck Hung; my wife, Louie Shee, and my sister, Lee Moon Wah.

By Insp. Bernsen: The photograph which has just been identified is entered in evidence as Exhibit #19.

By Insp. Bernsen to older applicant:

Q. When and where was Exhibit #19 taken? A. On the same day and in the same place as the previous photograph.

By Insp. Bernsen to counsel:

Q. Have you anything further to offer? A. I have a certificate, which contains a photograph of the mother and contains the names of the children, which I would like to offer in evidence.

Q. Are you able to establish a basis for the introduction of this document into evidence? A. I understand that document contains information relevant to the names and births of the children.

Q. Counsel, I am referring to a legal basis on which this document may be entered in evidence; do you have anyone who can identify this document? A. If the mother was here she could identify the document.

By Insp. Bernsen: The document offered by Counsel will not be accepted for entry into the record, inasmuch as the proper foundation for such entry into evidence has not been established by counsel. After deliberation this Board has decided that it will give no weight whatsoever to this document. However, the contents of it will be noted upon the record.

By Counsel: Exception.

By Interpreter Yung: It is a Certificate of Identity issued by Lung Hoy Heung, Toishan District, which states that Wong Tew Hee, wife of Lee You Har, has filed a petition for the issuance of a certificate stating "I, female, age 43, born K. S. 33-10-18 in Hoy Chew Village, Toishan District; that I was married to Lee You Har on C. R. 12-2-26; that my husband, Lee You Har's marriage name is Sai Ping; that my husband is a citizen of the United States; that he is in business in New York in the United States; that it is my intention to proceed to New York of the United States to join my husband, Lee You Ha." Having found the

aforesaid allegations true and correct this certificate is issued. It is dated C. R. 37-10-6.

On the left hand side of the certificate the following appears: Husband, Lee You Har, born K. S. 33-8-15 in Fung Gong Village; married C. R. 12-2-26 in Fung Gong Village; present address, New York of the United States; Self, Wong Tew Hee, born K. S. 33-10-18, in Hoy Chew Village; married C. R. 12-2-26 in Fung Gong Village; present address, Lung Woy Village. Eldest son Lee Sang Hai, born C. R. 14-3-13 in Fung Gong Village; second son, Lee Kum Ock, born C. R. 19-7-16 in Fung Gong Village (twin of Lee Kum Hoy); third son, Lee Kum Hoy, born C. R. 19-7-16 in Fung Gong Village (a twin of Lee Kum Ock); fourth son, Lee Kum Cherk, born C. R. 28-4-1, in Lung Woy Village; last, Lee Moon Wah, born C. R. 29-5-15, in Lung Woy Village.

By Counsel to Insp. Bernsen:

Q. May I ask all of the applicants to identify the photograph which is attached to this document? A. Yes.

By Counsel to all three applicants:

Q. Whose photograph is attached to this document? A. (by all three applicants). Our mother, Wong Tew Hee.

By Insp. Bernsen to Interpreter:

Q. Does this document show before whom the petition was made and when and where it was made? A. No, but the certificate is issued by Lee Nee Moy, Village Elder.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

By Insp. Bernsen to older applicant:

Q. Did all three of you travel to the United States together? A. Yes.

Q. When and where did you board the plane? A. On June 11, 1952, at Hong Kong.

Q. What line owned the plane you boarded at Hong Kong? A. The Northwest Airlines.

Q. And to where did that plane take you? A. I believe that plane took us to a place called Vancouver; but we stopped at a number of places before arriving at Vancouver in that plane.

Q. Did you board another plane at Vancouver? A. Yes.

Q. Did the plane which you boarded at Vancouver bring you to New York? A. No, we changed planes again at Montreal, Canada.

Q. Who operated the plane which you took from Vancouver to Montreal? A. I don't know.

Q. Did the plane which you boarded at Montreal, Canada, bring you to New York? A. Yes.

Q. Who operated that plane that brought you to New York and where did you board it? A. I don't know what line and we boarded that plane at Montreal.

By Insp. Bernsen:

Q. Have the Board Members any questions?

By Inspector Constantine: I have no questions.

By Secretary-Member Monahan: I have no questions.

By Inspector Bernsen to counsel:

Q. Have you any further questions? A. No.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

By Insp. Bernsen to applicants: Upon the evidence adduced in this case I propose the following findings of fact and conclusions of law:

FINDINGS OF FACT:

(1) That you are all natives of China;

(2) That you all last arrived in the United States as passengers at the port of New York on June 17, 1952, having started on your journey to the United States from Hong Kong on June 11, 1952, on a plane operated by the Northwest Airlines, and having made two changes of planes in Canada enroute;

(3) That you are all seeking to enter the United States as citizens thereof;

(4) That you are all in possession of travel affidavits authorized for travel to the United States by an American Consular Officer;

(5) That you are not in possession of immigration visas;

(6) That you are not in possession of any passports or travel documents issued by the country in which you were born or to which you owe allegiance;

(7) That you claim to be citizens of the United States as the children of Lee Ha, whose United States citizenship has been conceded by the Immigration Service on previous occasions;

(8) That you claim that your mother is Tew Hee Wong, alleged to be the wife of Lee Ha;

(9) That the testimony of the three of you and of your two witnesses has been reasonably harmonious and

reasonably consistent with the records of the Immigration and Naturalization Service;

(10) That the three of you and your alleged parents have been given blood tests by the United States Public Health Service on two separate occasions;

(11) That the United States Public Health Service changed the results of the "MN" type blood tests after making a second test as to your parents, and as to you, Lee Kum Hoy, making the claimed parentage on the basis of this revised "MN" blood type test possible, in accordance with page 685 of Exhibit #2;

(12) That the blood grouping tests (A & B) were consistent as to the three of you and your claimed parents, showing your claimed parents each to be in blood group "A", and showing you, Lee Moon Wah, to be in blood group "B", and you Lee Kum Hoy, to be in blood group "B", and you Lee Kum Cherk to be in blood group "O", thus excluding the possibility of the claimed parentage as to Lee Moon Wah and Lee Kum Hoy, in accordance with page 684 of Exhibit #2;

(13) That although the claimed parentage is possible in the case of you, Lee Moon Wah, in accordance with page 684 of Exhibit #2, your credibility is impeached by the results of the blood tests insofar as they affect the claimed parentage of Lee Kum Hoy and Lee Kum Cherk;

(14) That on the basis of the blood grouping tests taken by the United States Public Health Service on two

occasions it cannot be said that all three of you have established your claimed relationship as the children of Lee Ha and Tew Hee Wong.

CONCLUSIONS OF LAW:

(1) That you are all inadmissible to the United States under section 13(a)(1) of the Immigration Act of 1924 in that you are immigrants not in possession of unexpired immigration visas, and not exempt from the presentation thereof under said act or regulations made thereunder.

(2) That you are inadmissible to the United States under Executive Order 8766 of June 3, 1941, in that you are not in possession of passports or other travel documents issued by the country to which you owe allegiance.

By Inspector Constantine: I concur.

By Secretary-Member Monahan: I concur.

By Inspector Bernsen to applicants:

Q. Have you heard and understood the findings of fact and conclusions of law arrived at by this Board? A. We have.

By Inspector Bernsen: Motion is in order.

By Inspector Constantine: On the basis of the findings of fact and conclusions of law I move to exclude the applicants from admission to the United States.

By Secretary-Member Monahan: Seconded.

By Inspector Bernsen: Unanimous.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

By Inspector Bernsen to applicants:

Q. You are informed that this Board has voted to exclude all of you from admission to the United States on the basis of the conclusions of law arrived at and read to you. From this decision you have the right of appeal to the Board of Immigration Appeals, acting for the Attorney General of the United States. Do you wish to appeal? A. (by counsel) On behalf of the applicants I wish to note their appeal from the adverse decision.

Q. You are further informed that the record in this case will be prepared and transcript thereof served upon you and you will have a reasonable time thereafter to file written exceptions thereto and/or brief. However, you may waive your right to receive the record and file exceptions and/or brief. Do you wish to waive this right? A. (by counsel) No; I wish a copy of the record sent to me.

Q. You are further informed that the record in this case, together with any exceptions and/or brief filed on your behalf, will be forwarded to the Board of Immigration Appeals for its consideration. Do you understand? A. Yes.

Q. You are further informed that if you are ordered deported you will be returned to the country whence you came at the expense of the transportation company that brought you here, in the same class and in like accommodations, and thereafter for a period of one year it will be unlawful for you to enter, or attempt to enter the United States, unless prior to your embarkation at a foreign port you have secured permission from the Attorney General of the United States to reapply for admission to the United States. Do you understand? A. Yes.

Board of Special Inquiry Hearing Held Commencing August 14, 1952, and Exclusion Order of September 18, 1952

By Insp. Bernsen to older applicant:

Q. You are informed that the Attorney General of the United States, in his discretion, may authorize a refund of the money paid for the passage of all three of you. In the event such refund is authorized where and to whom do you wish it sent? A. To my father in New York.

Q. What was the cost of your passage to the United States? A. A little over $800 per person for me and my brother, but my sister paid one-half fare.

Q. Do you have a copy of your transportation ticket to the United States with you? A. Not on my person.

Q. When and where was your transportation ticket purchased? A. In New York by my father.

Q. Before you boarded the plane at Hong Kong were you asked to show your travel documents? A. Yes.

Q. Did you show them? A. Yes.

FINE NOTICE ISSUED IN THIS CASE.

I hereby certify that the foregoing, consisting of eight pages, is a true and correct transcript of the stenographic notes recorded by me.

J. J. MONAHAN
Secretary-Member.

4.00 P.M.

Decision of Board of Immigration Appeals of May 11, 1953, Dismissing Appeal

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

May 11 1953

Files: 0300/423253—New York
0300/423254—New York
0300/423255—New York

In re: LEE KUM HOY, LEE KUM CHERK and LEE MOON WAH

IN EXCLUSION PROCEEDINGS

IN BEHALF OF APPELLANTS: Chow and Sing, Attorneys
550 Montgomery Street
San Francisco, California

Samuel Bernstien, Esquire
551 Fifth Avenue
New York 17, New York

Lambert O'Donnell, Esquire
957 Warner Building
Washington 4, D. C.

EXCLUDED: Act of 1924—No Immigration Visas
E. O. 8766—No Passports

APPLICATIONS: Admission as a United States citizen under section 1993 Revised Statutes (Lee Kum Hoy)
Admission as United States citizens under section 201(h) and (g) of the Nationality Act of 1940 (Lee Kum Cherk and Lee Moon Wah)

Decision of Board of Immigration Appeals of May 11, 1953, Dismissing Appeal

Appellants are two boys and a girl, aged 21, 13 and 12 years. They arrived by plane from Hong Kong, China on June 17, 1952. They claim to be brothers and sister, the children of Lee Ha, and his wife, Wong Tee Hee, to whom the alleged father was married in China in 1923. They claim United States citizenship by virtue of the citizenship of the alleged father under Section 1993, R. S. and 201(h) and (g) of the Nationality Act of 1940. They were excluded by a Board of Special Inquiry at New York on September 18, 1952, the Board having found that the relationship was not sustained, that the appellants are alien immigrants and inadmissible on documentary grounds.

The United States citizenship of the alleged father has been conceded by the Immigration and Naturalization Service. The alleged mother was admitted to the United States on January 16, 1949 and is a legal resident, now living with the alleged father. The alleged father acted as witness in 1939 for Lee Kim Ark (Seattle file 2500/12921), an alleged twin brother of appellant Lee Kum Hoy. The appellants appealed to this Board from the order of exclusion.

The Board of Special Inquiry found, after extensive interrogation of each of the appellants, the alleged father and the alleged mother, that the testimony of all of them was "reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service." The finding of non-citizenship and the exclusion order were based upon the results of blood-grouping tests.

Two complete series of blood-grouping tests were made on each of the appellants and on the alleged father and

mother. The results of these tests were interpreted by the Board of Special Inquiry in accordance with tables set forth in Exhibit 2 of this record, an article entitled "Blood-Grouping Tests in the New York Courts" by Alexander S. Wiener, M. D. The Board of Special Inquiry found that the results of the blood tests are such as to include the possibility that two of these three appellants, Lee Kum Hoy and Lee Moon Wah, could be the children of these parents. We have considered these tests and the cases and literature interpreting them in *Matter of Lee Fay Fan*, 0300/423162 (February 25, 1953). In that case we declared that henceforth we would consider that the results of these tests are conclusive, if the tests have been properly conducted. We declared that henceforth a showing of incompatability of blood conclusively establishes non-paternity.

In the first series of tests the alleged father was found to have AM blood, and the alleged mother to have AM blood. Lee Kum Hoy was found to have BMN blood. Lee Moon Wah was found to have BMN blood. Lee Kum Cherk was found to have ON blood. In the second series of tests the alleged father was found to have AMN blood and the alleged mother to have AMN blood. Lee Moon Wah was found to have BMN blood, Lee Kum Hoy to have BM blood and Lee Kum Cherk to have ON blood. Set up in tables the results of the tests are as follows:

		1st Test	2nd Test
Father	—	AM	AMN
Mother	—	AM	AMN
Wah	—	BMN	BMN
Hoy	—	BMN	BM
Cherk	—	ON	ON

We will not repeat here the laws of heredity and the tables set forth in *Matter of Lee Fay Fan, supra.* They are the same tables as those in Exhibit 2, Dr. Wiener's pamphlet, and in 163 A. L. R. 923. They are universally accepted by medical authorities and widely accepted by legal authorities.

The only change in results caused by the changes in blood typing in the second series of tests, is as to the appellant Lee Kum Cherk. According to the accepted rules of heredity of blood types, two parents with A blood cannot have children with B blood, but they can have children with O blood. Two parents with M blood cannot have children with MN or N blood. Two parents with MN blood, however, can have children with any of the types of M, N or MN blood. According to the first tests, all three appellants were inadmissible. According to the second tests the blood of Lee Kum Cherk is not incompatible, but the blood of the other two applicants is still incompatible with that of the alleged parents.

The Board of Special Inquiry in its Findings of Fact, #13, misstated the results of the tests by transposing the names of two of the appellants. The finding should read: "(13) That although the claimed parentage is possible in the case of you, *Lee Kum Cherk,* in accordance with page 684 of Exhibit #2, your credibility is impeached by the results of the blood tests insofar as they affect the claimed parentage of *Lee Kum Hoy* and *Lee Moon Wah.*"

The three appellants and the alleged parents are all shown to be unreliable witnesses by the blood tests. They have all testified under oath that the three appellants are blood

brothers and sister, that they are the children of the alleged parents. No rule of evidence is more widely accepted than that of "false in one thing, false in all." Although the blood tests did not prove non-paternity in the case of Lee Kum Cherk, he was found inadmissible on the basis of the false testimony of all witnesses. There is no evidence of sufficient probative value to establish the relationship of Lee Kum Cherk under these circumstances. This was a proper exclusion. There are discrepancies in the record, but we do not deem it necessary to discuss them here.

Counsel complains of the manner in which the tests were made and the results made known. Counsel also complains that the Board of Special Inquiry refused to allow additional tests to be made by "well-known medical authorities" except under some kind of "supervision." (p. 3, appellant's brief). Since we have held that the results of such tests are conclusive as to non-paternity when properly performed, the only question before this Board is whether or not the tests were accurately executed by competent technicians.

As for "supervision", this was a proper stipulation by the Board of Special Inquiry and, indeed, an essential one. Existing statutes covering blood grouping proof unanimously provide for adequate judicial control.* Tests should be inadmissible unless they are made under approved conditions.

The results of both series of tests are evidenced by the usual pink cards, Form 5146, Exhibit 1, herein, with the

---

* Statutes set forth in Appendix to *Matter of Lee Fay Fan*, 0300/423162 (February 25, 1953).

initials of the technician making the test. The initials on the second series are different from the initials on the first series. If counsel feels that the individuals making these tests may have gone wrong because of faulty techniques or that the results of the tests have not been accurately reported, the proper action would have been to have secured a new set of tests by unexceptionable hands. However, counsel offers no evidence in support of his contention that the results of the tests conducted by the United States Public Health Service are unreliable. In *Lew Mun Way* v. *Acheson*, 110 F. Supp. 64 (S. D. Calif. February 2, 1953) the government offered as evidence the results of two radiological examinations on the basis of which two doctors had declared the applicant to be 10 or 12 years of age rather than the 18 years claimed by him. The applicant offered no evidence to controvert these findings but the alleged father's affidavit. The Department of State refused to document the boy for travel to the United States as a United States citizen, the son of the alleged father. The court said:

> . . . . although there were present in Hong Kong many reliable physicians, qualified to conduct radiological examinations, no attempt was made by plaintiff to obtain such an examination in order to disclose whether the findings theretofore made in the separate examinations of the two physicians mentioned were incorrect. Either plaintiff did not avail himself of this opportunity to have the examination, or, if he did have the examination, the result coincided with the findings of the examining physicians heretofore mentioned and, therefore, was not presented to the State Department.

Decision of Board of Immigration Appeals of May 11, 1953, Dismissing Appeal

In all of the recent cases before us wherein exclusion was predicated on the results of blood grouping and typing tests the Immigration and Naturalization Service has obtained re-checks of the test results from the United States Public Health Service. The matter is considered of sufficient importance to take this precaution. If a re-check uncovers an error in the first tests it is proper and necessary that the second test results be accurately reported in the exhibits. It is not cause for derision that rechecks have revealed different results from the first tests. It is their purpose to reveal errors if there have been errors. Nor does the fact that there have been errors, corrected by the rechecks, require us to discard the whole accepted and respected procedure. In both *Flynn ex rel Yu Suey* v. *Ward*, 104 F. 2d 902 (1 Cir., 1939) and in *Ly Shew* v. *Acheson*, 110 F. Supp. 56, 59 (N. D. Calif. 1953) the courts said, "The mere say-so of interested witnesses does not have to be accepted". The mere say-so of counsel does not prove that the test results are inaccurate.

Counsel's other objections have been considered in *Matter of Lee Fay Fan*, supra, and *Matter of Wong Kay Suey* and *Wong Poo Sing*, 1495259-60 and we will not repeat here the discussion contained in those cases.

It is our conclusion that the record in this case establishes that the appellants have not sustained the burden of proving the claimed relationship to the alleged father. The appeal must be dismissed.

ORDER: It is ordered that the appeal be dismissed.

THOS. G. FUNICANE
Chairman

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

MC—1

Names of aliens:

LEE, KUM HOY 21 M
LEE, KUM CHERK 15 M
LEE, MOON WAH 14 F

Claim U. S. Citizenship—Chinese

0300-423, 253-4-5
Re-opened Hearing

Record of Hearing before Board of Special Inquiry held at Room 11, 8th Floor, 70 Columbus Ave., New York City.

November 5, 1953 — 2:00 P. M.

Present: Insp. S. Bernsen, (Chairman)
Insp. J. J. Monahan,
Insp. M. Ciepka, (Secretary)
Intr. C. H. Yung, (Chinese)
Lee Ha, Father of applicants.

Counsel: Benny Gim,
of Hong & Gim,
551 Fifth Avenue,
New York, N. Y.
Tel. No. Mu7-8596

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September 1953, Reported in 115 F. Supp. 302

Arrived TCA Flight CF-TFV 324/7, June 17, 1952.

Deferred August 14, 1952; MC-130.

Excluded September 18, 1952; JJM—17.

Writ of Habeas Corpus—July 13, 1953.

Court Order to Re-open Hearing—October 16, 1953.

Minutes of previous hearings made part of this record.

By Insp. Ciepka: I have familiarized myself with the record to date.

By Insp. Bernsen to Applicants, who testified in the Chinese language, through Interpreter Yung:

Q. What are your names, dates and places of birth? A. (By older male applicant) Lee Kum Hoy, 24, born C. R. 19-7-16 in Fung Gong Village, Toishan District, China.
(By younger male applicant) Lee Kum Cherk, 15, born C. R. 28-4-1 in the Lung Woy Village, Toishan District, China.
(By female applicant) Lee Moon Wah, 14, born C. R. 29-5-15 in the Lung Woy Village, Toishan District, China.

Q. Will you please rise and raise your right hand to be sworn. (All comply) Do you solemnly swear that the testimony you will give will be the truth, the whole truth, and nothing but the truth, so help you God? A. (By each) I do.

Q. You are warned that should you give false testimony in this matter you may subject yourself to prosecution for perjury and upon conviction be liable to a penalty of imprisonment for five years and a fine of $2,000. Do you understand? A. (By each) Yes.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Are you the same persons who were excluded from admission to the United States by a Board of Special Inquiry on September 18, 1952? A. (By older male applicant) Yes we are, but I don't remember the exact date.

Q. You are informed the United States District Court for the Southern District of New York in an order dated October 16, 1953 signed by E. J. Dimock, United States District Judge, has ordered your hearing before a Board of Special Inquiry re-opened for proceedings in accordance with the opinion of the Court. Do you understand? A. (By older male applicant) Yes.

Q. Are you now represented by this gentleman as your counsel? A. (By older male applicant) Yes.

Insp. Bernsen to counsel:

Q. Counsel, will you please identify yourself for the record? A. Benny Gim, of the firm of Hong & Gim, offices at 551 Fifth Avenue, New York City. Admitted to practice in the State of New York and before the Board of Immigration Appeals; notice of appearance in the case is on file.

Q. Counsel as you know under the Immigration and Nationality Act exclusion proceedings are required to be conducted by a Special Inquiry Officer. Such proceedings are no longer conducted by a Board of Special Inquiry. However, under the Savings Clause of the Immigration and Nationality Act, Section 405, you may have this re-opened hearing before a Board of Special Inquiry. However, if you wish this hearing may be held before a Special Inquiry Officer. Would you please state what your

wishes are in this regard? A. I will request for a hearing before a Special Inquiry Officer rather than a Board of Special Inquiry with the reservation that the hearing will be conducted in accordance with the rules and regulations of the Immigration Service existing prior to the Immigration and Nationality Act of 1952.

Insp. Bernsen to Counsel: Your request is noted and will be granted.

By Counsel: May I respectfully request the record note that my office was notified at 4:45 P. M. yesterday by Mr. Max Blau of the District Counsel's Office that a new hearing would be held today at 2:00 P. M. at the office of Mr. Werner. May I also state that my partner, Edward Hong, left for a vacation of two weeks last night and the burden of running the office is upon me, therefore in view of the short notice and the vacation of my partner I request an adjournment for a period of three weeks from the coming Monday. May I also request a three day notice prior to the convening of the next hearing.

By Insp. Bernsen: This Board grants your request for an adjournment.

By Counsel: Mr. Chairman, may I make a further request? May the children who have been in custody for eighteen months be released on administrative bail pending the convening of the next hearing.

By Insp. Bernsen: This Board has no jurisdiction on the subject matter of your request and is unable to act upon it.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

By Insp. Bernsen: Motion is in order.

By Insp. Monahan: I move that the proceedings before this Board be transferred to a Special Inquiry Officer under the Immigration and Nationality Act.

Insp. Ciepka: Seconded.

By Insp. Bernsen: Unanimous.

I certify that the foregoing, consisting of 3 pages is a true and correct transcript of the stenographic notes recorded by me in the above case.

MARY CIEPKA
Mary Ciepka,
Immigrant Inspector.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of Exclusion
Proceedings

—against—

LEE KUM HOY
LEE KUM CHERK
LEE MOON WAH
Applicants

File Nos:	0300-423253, 254, 255
Special Inquiry Officer:	Aaron I. Maltin
Stenographer:	Sheldon Handschuh
Date:	November 30, 1953
Language:	Chinese
Interpreter:	S. Z. Szeto
Hearing held at:	U. S. Marine Hospital Staten Island, N. Y.
Counsel:	Benny Gim—of Hong and Gim, 551 Fifth Ave., NYC
Co-Counsel:	Sidney B. Schatkin 100 Centre St., NYC

Special Inquiry Officer to applicants:

Q. You are all advised that you are still under the oath that you took at the time of your last hearing on November 5, 1953. Do you understand that? A. (By all) Yes.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Counsel Gim: I would like to introduce my co-counsel, Sidney B. Schatkin, 100 Centre Street, New York.

Special Inquiry Officer: In the course of this proceeding, as there are two counsel only one will speak in the course of the proceeding. Is that agreeable?

Counsel Gim: Well, no—I mean, Mr. Schatkin and I would like to alternate. Well, we won't cross-examine the same people but at various times Mr. Schatkin will take over and at other times I will.

Counsel Schatkin: At a given time, Mr. Gim may ask me to examine a witness.

Special Inquiry Officer: All right, if it can be done without confusion and in order to keep the record clear I didn't want two persons objecting or two persons interjecting at the same time. At the moment you are continuing, Mr. Gim?

Counsel Gim: That's right.

Special Inquiry Officer: I understand that you wish to present a witness at this time out of order?

Counsel Gim: First of all may I ask you, Mr. Chairman, if you received a letter from me dated November 14th addressed Edward J. Shaughnessy with regard to this case in which I requested that certain witnesses and certain evidence be produced pursuant to the decision of Judge Dimock dated September 17, 1953?

Special Inquiry Officer: I don't see that letter in the file.

Counsel Gim: May I introduce this into the record?

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953 Reported in 115 F. Supp. 302

Special Inquiry Officer: Copy of letter dated November 14, 1953 addressed by Benjamin Gim to the District Director, New York District with reference to this case is entered into evidence together with the registered return receipts attached thereto as Exhibit #20.

What witness do you wish to present at this time, Mr. Gim?

Counsel Gim: I wish to present Dr. Sussman.

Special Inquiry Officer to witness:

Q. What is your full name and address? A. Leon N. Sussman, 36 East 38th Street, New York City.

Q. Would you please stand and raise your right hand to be sworn. Do you solemnly swear that all the testimony you will give at this hearing will be the truth, the whole truth and nothing but the truth, so help you God? A. Yes.

Counsel Schatkin: May I have permission to examine Dr. Sussman?

Special Inquiry Officer: You may proceed.

Counsel Schatkin to witness:

Q. Are you a licensed physician, Dr. Sussman? A. I am.

Q. And your office is at 36 East 38th Street, New York City? A. Yes.

Q. Do you specialize in any field of medicine? A. Hematology.

Q. And what is hematology? A. The stury of abnormalities of the blood and characteristics of the blood.

Q. And does that include the field of serology? A. Yes.

Q. And what is serology? A. The study of the reactions of the serum in the cells of the blood.

Q. Hematology has to do with the diseases of the blood in general? A. That's correct.

Q. Cancer of the blood did you say? A. Yes.

Q. And serology has to do with the characteristics of the blood or the blood cells with reference to identifying the blood group or type of an individual? A. That is one branch of serology.

Q. Have you conducted any blood tests in connection with paternity cases? A. Yes.

Q. By order of the court? A. By order of the Court of Special Sessions and by request of interested individuals.

Q. Private patients? A. Yes.

Q. Are you able to state approximately how many blood tests for—are you able to state how many blood tests you have carried out? A. Under the heading of blood test I would say in the thousands.

Q. How many years have been devoted by you to carrying out blood tests? A. Blood tests in general since 1936.

Q. And you say the blood tests you have carried out are in the thousands? A. Yes.

Q. Have you had any scientific papers published, scientific papers relating to blood types? A. Yes.

Q. Are you a member of any scientific societies? A. American scientific societies relating to abnormalities of blood and blood testing.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Are you on the editorial board of any scientific publication? A. No.

Q. Are you on any committees appointed by the American Medical Association in connection with the blood groups? A. Yes, on the Committee of the Medical Legal Application of blood grouping tests of the Medical Association.

Q. And you have been doing this work since 1936? A. Yes.

Q. And would you say you have been doing it regularly and continuously since 1936? A. Except for a period in the service of three years.

Q. You were in the United States Navy? A. Yes.

Q. What were your duties in the United States Navy? A. To put it mildly, they were varied. They were not related to serology.

Q. I am going to show you two sets of photostats. Now, the first set consists of three photostatic cards and three of them are dated 7/1/52, apparently July 1, 1952, and two of them are dated July 17, 1952. Have you seen this set of photostats? Take a look at them. A. Yes, I have.

Q. You have seen them? A. Yes.

Q. Have you studied them? A. Yes.

Q. Look at them, please. I show you another set of photostsats and these seem to be dated August—three of them are dated August 11th, apparently 1952; one is dated August 13th, the fifth one has no date. Have you seen this set of five before? A. Yes, I have.

Q. Have you studied them? A. Yes, I have.

Counsel Schatkin: At this time I want to offer in evidence the first set of photostats which have

a July date, five copies, five photostats, and I want to offer in evidence five photostats which seem to have an August date, apparently 1952.

Special Inquiry Officer: Of what are they photostats, may I ask?

Counsel Gim: They are photostats of the Public Health Service test which you have in your files.

Special Inquiry Officer: Are these not already exhibits in this hearing?

Counsel Schatkin: The originals are, yes. Perhaps, Mr. Chairman, you want to compare the photostats with the originals.

Special Inquiry Officer: Off the record.

On the record.

I note from an examination that these photostats are photostats of what are now termed the first test and the second test and which are now part of this record as Exhibit #1. Is that correct, Mr. Gim?

Counsel Gim: I don't know about the exhibit designation but if your records so state I will concede that.

Special Inquiry Officer: I won't take these into evidence then but if you wish to continue the questioning along this line it would be best for clarity to refer to this as the first test and the second test, which are now exhibits in this case.

Counsel Gim: Mr. Chairman, will you so concede that these are photostatic copies of the blood test reports that you now have as exhibits?

Special Inquiry Officer: Yes, of course.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Counsel Schatkin to witness:

Q. Dr. Sussman, you have testified that you have examined these two sets which the Chairman has marked in evidence previously and where there is now a concession that they are photostatic copies of those exhibits. They will be referred to as the first test and the second test: A. Right.

Q. The first apparently will be the one that bears the date July, 1952 and the second August, 1952. You have examined these? A. Yes.

Q. Will you tell us on any of these photostats is there a signature of the party who was tested? A. There are initials.

Q. Are there any signatures of the individuals who were tested that you can see? A. No.

Q. Is there any thumb print of any—any fingerprint or thumb print of any individual? A. No, there is no identification of any kind, to the best of my knowledge.

Q. Is there a photograph on that as to each individual tested? A. No, sir.

Q. Dr. Sussman, have you read—withdrawn. On the basis of your study of these two sets of photostats and after reading them, after studying them, are you able to form a conclusion as to whether on the basis of those reports are you able to form a conclusion as to the paternity or non-paternity of the three children and the two alleged parents on the basis of those reports? Any conclusion? A. No, I am not.

Q. Are you able to say on the basis of those reports whether the three relators, the three children involved here, are not the children of the two alleged parents? A.

No conclusion as to paternity can be made from these reports.

Q. Are you able to state that paternity is uncertain or inconclusive? A. No conclusion as regarding paternity can be made from these reports.

Q. There is no doubt in your mind that a blood test was carried out, is there? A. None at all.

Q. There is no doubt in your mind that a blood test was carried out which formed the basis of these reports, is that right? A. That's correct.

Q. Now, ordinarily when a blood test is carried out what are the only two results possible? A. The only determination that is possible is first an exclusion of paternity or second, no opinion can be given as regards paternity, an inconclusive report.

Q. On the basis of these two blood tests as shown by the photostatic copies, each set, what conclusion would you say, if any, is possible? A. There are none possible.

Q. Now, will you state the reasons why you make that answer. A. There are doubts in the results obtained in these blood tests and those doubts are sufficient to throw doubt or question on the validity of the test. Having doubtful validity of the test prevents me from giving any opinion as to the paternity involved because in blood testing of this nature there must be no doubt in the results obtained and there must be complete accuracy in all of the reports that are obtained.

Q. Can there be any controversial question in a report which you hand up excluding paternity? Could there possibly be a controversy? A. No, there could not be as the tests are run twice.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Suppose that you should conduct a blood test with the result, for instance, where the alleged father belongs to group RH-1, RH-2 and the child belongs to group RH-Negative. Isn't that apparently an exclusion of paternity apparently on the face of it? A. No, that is not.

Q. You say no, that is not. As a practical proposition, would you say that is an exclusion? A. No.

Q. How would you explain that? What determination— A. Assuming the accuracy of the report which you are giving me——

Q. That isn't what I mean. Let me reframe the question. You have handed up many reports excluding paternity from the Court of Special Sessions paternity cases, is that right? A. Yes.

Q. In those reports which you handed up in which paternity is excluded is there say one chance in a thousand that in any one of those reports you could be in error? A. There could not be.

Q. If you thought there was one chance in a thousand your report was in error what would your conclusion be? A. An inconclusive test of paternity.

Q. If the chances are one-thousand to one you would report that as inconclusive? A. Yes.

Q. You are that careful? A. You have to be.

Q. Have you ever noted any controversy to any blood test reports? A. I don't know of any disagreement between the experts in the reporting of results of blood tests.

Q. When you carry out a blood test how much blood, how large a sample of blood do you use? A. Five cubic centimeters. Five cubic centimeters of blood are sufficient.

Q. You draw the blood from a vein? A. Yes, as a rule.

Q. Near the elbow? A. Yes.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Can you indicate the size of five centimeters? A. Roughly a teaspoon full of blood.

Q. When you arrive at an exclusion of paternity do you repeat the test? A. All tests are run in duplicate even without an exclusion of paternity.

Q. How many tests are run in each case? A. Usually ten on each sample of blood.

Q. Ten tests? A. Yes, in duplicate, so that becomes 20. If an exclusion is made that is repeated.

Q. So in an exclusion that is 20 tests in each sample? A. 40, if one gives weight to the fact that each test is repeated as you go along.

Q. Will you tell the Chairman please in your judgment what would be the qualifications of a technician or a physician qualified to carry out blood tests. A. The manual of the American Medical Association referring to the medical-legal application of blood tests has set forth the qualifications very carefully.

Q. Would you tell the Chairman what you are reading from. A. This is the Medico-Legal Application of Blood Grouping Tests.

Special Inquiry Officer: Published by whom?

Witness: The American Medical Association and it is a report of the Committee on Medical-Legal Problems of which I was a member.

Special Inquiry Officer: Counsel, do you intend to offer this as an exhibit?

Counsel Schatkin: Only part of it. I want to offer a part of it which Dr. Sussman will read now concerning the qualifications which a technician should possess. This is being read from a paper

called Medico-Legal Application of Blood Grouping Tests, a report of the Committee on Medicolegal problems, American Medical Association, prepared by doctors Davidsohn, Levine and Wiener. It is a re-print, re-printed from the Journal of the American Medical Association June 14, 1952, Volume 149, pages 699-706.

Witness: This is on page 18. It comes under the heading "Qualifications of Experts".

Counsel Schatkin: Should I read it into the record?

Special Inquiry Officer: In what form did you wish to offer it then, just in oral form as you are reading it from the booklet?

Counsel Schatkin: I think I will offer the re-print in evidence and ask that it be marked as an exhibit and then I will read just one paragraph from it.

Special Inquiry Officer: If you intend to offer the book it's not necessary. Just indicate the paragraph and I will read it.

Counsel Schatkin: I want to indicate a paragraph which appears on page 18.

Special Inquiry Officer: There is entered into evidence as Exhibit #21 only that portion of the booklet previously identified which is contained in the booklet on pages 18 and 19 under the heading "Qualification of Experts" consisting of three paragraphs.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Counsel Schatkin to witness:

Q. Dr. Sussman, it is of the utmost importance that the individual being tested should be properly identified by the technician, is that right? A. Yes, but it doesn't matter by whom the identification is made.

Q. What method do you use in your laboratory for the identification of an individual to be tested? A. Most of the time fingerprinting or in the absence of an opportunity to fingerprint we will accept social security cards or automobile license as a means of identification.

Q. Do you have signatures of the parties? A. Yes, signature of the party obtained with a fingerprint.

Q. At the present time you are conducting blood tests for the Immigration Service? A. I am.

Q. And in carrying out blood tests do you cross-check from the red blood cells and also cross-check the serum? A. May I go back please—the Immigration Service sends with every person to be tested a man who identifies the applicant with a letter which the applicant has received. We do not fingerprint the immigration applicants at all. They are identified by the agent who is working for the Immigration Bureau.

Q. In your laboratory you have a number of technicians? A. Yes.

Q. Do they carry out some of the processes of blood testing? A. Yes.

Q. Under whose supervision? A. Mine.

Q. In conclusion, you definitely state that as far as these two sets of reports are concerned you cannot conscientiously or otherwise exclude paternity of these three children on the basis of these reports. Would you state

in your opinion that the three children involved here, the relators, are not the children of the particular parents here? A. May I be permitted to qualify my answer?

Special Inquiry Officer: Certainly. You may answer in any way you choose, doctor.

Witness: I am questioning the validity or the accuracy of this report and on the basis of such I cannot exclude paternity. I am not saying that blood testing is not a good way to establish non-paternity but on these particular reports I am loath to do it because of a feeling that there are inaccuracies which prevent me from establishing these as good evidence of paternity or non-paternity. I consider these tests invalid by virtue of errors in these reports. I am a staunch——

Counsel Gim to witness:

Q. I have one question, doctor. You have been conducting tests for the Immigration Service, is that right? A. Yes.

Q. Since about when? A. I should say 1951 or 1952. It must be early 1952.

Q. Approximately how many of these blood tests have you conducted for the Immigration Service as a rough estimate? A. I don't know if I can answer your question.

Q. Just a rough guess. A. These tests are not performed as an agent of the Immigration Service.

Q. But you do perform these tests? A. I want to answer you carefully if I can. These tests are performed when the Immigration authorities have requested me to have blood tests done.

Q. However, you are one of the individuals, one of the doctors selected by the Immigration Service to conduct blood tests? A. I was selected by a panel of the Medical Society. There is a list and they select from that list an expert to whom they apply to have a test done.

Q. That is, the Immigration Service? A. No sir, the applicant selects from that table.

Q. How does the applicant know about the table? A. Apparently somebody in the Immigration office when a blood test is requested or required presents this table to the applicant and he selects from this a doctor so that he has a right of the selection of a doctor of his own choice.

Q. But you are apparently an expert approved by the Immigration Service? A. Yes.

Q. Would you say that you have conducted 300 blood tests? A. Yes.

Q. Or over 300? A. 300.

Q. Now, according to your own recollection what is the racial antecedent of all people tested? A. They are of Chinese extraction.

Q. All Chinese extraction? A. Yes.

Q. You don't recall a white person being sent by the Immigration Service for the purpose of disproving paternity? A. No, I don't recall.

Q. You know Dr. Wiener, don't you? A. Yes.

Q. He is a qualified serologist? A. Yes.

Q. Have you ever discussed with Dr. Wiener the question of blood tests for the Immigration Service? A. No, sir.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Counsel Gim: That's all.

Counsel Schatkin: That's all.

Special Inquiry Officer to witness:

Q. Doctor, if you were to examine the sets of photostats that were presented to you individually, set by set, would you be able to tell from that whether there would be an exclusion of paternity on each set alone? A. If we are to assume that everything was accurate up to the point which I received an individual set I could exclude paternity.

Q. Looking at the set marked July, the first set—I presume you are aware which two names represent that of the parents? A. Just to be sure, Lee Ha and Wong Tee Hee.

Q. Yes. With that in mind, the other three being that of the children, could you state for the record looking at that test alone and assuming its accuracy in full, whether paternity is excluded in any of the three children? A. All three children are excluded in this test.

Q. Looking at the second test would you say that there is any exclusion of paternity? A. Yes, two children are excluded in this test.

Q. Which two are those? A. Lee Kum Hoy and Lee Moon Wah.

Q. Now, how many technicians do you have working for you, doctor? A. Four.

Q. When you have them run tests you don't supervise to the extent of watching what they do, do you? A. Not every moment of the time, no sir.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Have there been tests run on individuals which you have run a second time which have had varied results on any occasion? A. Yes. Each duplicate test is run by a different technician and the moment any question of a failure to correlate exactly comes up the test must be repeated by a third technician, each one working independently.

Q. If that was the case and a third technician ran a test what test would you accept as the most accurate one or the one that you would present to the court? A. We must find out why it was inaccurate.

Q. Then there is a possibility of error for personal reasons or other reasons? A. The human error always exists. That's the purpose of the multiple-duplication system.

Q. In your opinion, is the test for determining whether a person is A or B or O type blood a difficult test? A. Some phases of it. The routine is not but there are aspects of the test which are sometimes very difficult and common errors are well known.

Q. Now, I understand that—correct me if I'm wrong—that there is some danger in giving a person of A blood a different type of blood in a transfusion, is that correct? A. A very serious danger.

Q. I know from my experience in the Army that millions of men were tested and as far as I can recall they were only tested once and the Army never felt it expedient to test every man as far as A, B or O blood type was concerned. They were satisfied with one test. A. 10 per cent of the Army testing has been proven erroneous.

Q. Then you feel it is worthwhile to have each test

run twice, even the fairly simple test of A or O or B type blood? A. The price of the error is so great that any number of checks never will satisfy us. May I continue?

Q. Surely. A. For example, the routine has been to test the blood just for the grouping of the cells. In addition, we do a reverse check. We check for the agglutinins that are present in the serum so that the routine test consists of testing the cells of the serum.

Q. So far as difficulty is concerned, is it more difficult for a technician to determine the RH type than the blood grouping of an individual? A. Yes.

Q. And would that person have to be a person of higher degree of specialty or training? A. Yes.

Q. In what category would you place the MN test? Is that more difficult? A. As difficult as the RH.

Q. What would cause a possible error, outside of the human error, in determining the results of a blood test? Are there any other errors possible? A. Yes, there is the strength of the serum. Many sera deteriorate with age.

Q. If the examination was made almost immediately after the blood was taken from the person that wouldn't occur, would it? A. Yes—the testing sera I'm speaking about.

Q. Is there anything else that you could think of which might cause error aside from the human error and the age of the sera? A. The accuracy of the serum.

Q. Is that due in any way as to what type you used, what manufacturer's serum you used? A. Absolutely. Most of us make our own sera for that reason.

Q. Have you found that the noted pharmaceutical concerns in the United States of some reputation don't turn

out good sera? A. Yes, and the less frequently tested such as RH. The accuracy of the AB serums is pretty well established now.

Q. Do you then use your own sera for all tests? A. Except AB—that's economically unwise.

Q. What do you use for making the AB tests? A. Normal sera.

Q. Any particular brand that you can recall? A. They are all under the control of the NIH and they have to satisfy certain requirements. They are all equally good.

Counsel Schatkin to witness:

Q. Dr. Sussman, have you ever had occasion in the course of a blood test for paternity to discover that the AB group that you concluded the man has differed from the AB group found by the Army? A. I don't recall just such a case.

Q. In doing the AB test, does your test include the sub-groups such as A sub-group 1, A sub-group 2? A. Yes.

Q. Do you invariably in the AB test look for the sub-groups? A. Yes.

Q. How many sub-groups are there in the A group? A. There are four described but only two are ever tested for.

Q. Have you ever known any case of a blood test carried out by a physician or a laboratory technician where one of the sub-groups A is reported to be a B group? A. I didn't hear of that.

Q. Where the blood is in reality one of the A sub-groups but is reported as a B? A. I don't recall any such case.

Q. Are the reactions of the A sub-groups similar in any way to the B groups? A. Only one and that is A sub-2B is frequently missed in red-testing because the

A sub-2 is a very weakly reacting antigen and so we will occasionally find a blood which has been categorically typed as B which is really an A sub-2B.

Q. Dr. Sussman, I want to ask only proper questions but the Chairman questioned you a while ago and he says referring—referring to each group of cards separately—first, the July cards, exhibits, and August—and the Chairman went on further and he said assuming the accuracy of the blood test as represented by each set of cards separately, would you say there is an exclusion and you answered "Yes". Do you recall that? A. Yes.

Q. That answer was based obviously on the assumption of the accuracy of the blood test shown in each card, is that correct? A. Yes.

Q. The question I have in mind is this: Without assuming the accuracy, have you in your reading of these two sets of cards together and not separately, can you express an opinion on the accuracy of the test carried out? A. Without assuming that these tests are accurate they don't warrant examination.

Q. I beg your pardon? A. They do not warrant examination.

Q. What do you mean by the statement they do not warrant examination? A. If you start to form an opinion from facts which are not true, the opinion itself is worthless so there is no point in continuing.

Special Inquiry Officer to witness:

Q. I notice from an examination of both series of tests, the first and the second, that the blood group of each individual, A, O and B, respectively, came out the same in both tests. If no tests had been run at all on the RH

type and on the MN blood group or factor, would you in each set of tests be able to make a conclusion as to paternity on just the blood group alone? A. If these were my results, yes.

Q. And if these were your results, A, B and O, as the case may be, looking at the first test, who would be excluded as children of the alleged parents? A. Lee Kum Hoy and Lee Moon Wah.

Q. And the second test? A. The same.

Special Inquiry Officer: Do you have any other questions of the doctor?

Counsel: Sclfatkin: No.

Special Inquiry Officer to Witness: You are excused, doctor. Thank you very much.

Special Inquiry Officer to Counsel Gim: Before proceeding further, in view of the fact that you have presented an expert and you have indicated in other ways that you cast a doubt upon the validity upon the tests which are now Exhibit #1, would you be willing to submit the three applicants and the parents to a new series of blood tests say by Dr. Sussman who was just here?

Counsel Gim: Mr. Chairman, may I ask you if this is an order by the Immigration Service?

Special Inquiry Officer: I am under no order to conduct this hearing in any fashion. I conduct it as I see best and to help me in making a determination I want to know for my own information if you are willing to submit to a test in each case. I would then be able to obviate in my mind your objections and I would be perfectly willing in view

of Dr. Sussman's qualifications to accept his testing as accurate and use that in making a determination in this case.

Counsel Gim: I see, Mr. Chairman, but are you making this as a voluntary request? Are you making this as a request or a direction?

Special Inquiry Officer: It's a request at the moment.

Counsel Gim: May I ask if this is a request that is coupled with a condition? Are you attaching any condition to this request?

Special Inquiry Officer: No conditions at all, merely to satisfy myself and you and all the persons involved. If there was an error in the past perhaps we can eliminate that error.

Counsel Gim: Mr. Chairman, I feel that the blood tests are not required by any statute or regulation. Furthermore, I also feel that—I am sure that you recognize, Mr. Chairman, that there are many other reasons, not including paternity, where people may not wish to take a blood test and may I cite that the refusal or the non-compliance with a request to take a blood test has also been recognized by the Board of Immigration Appeals in several decisions.

Special Inquiry Officer: However, I would like to know for this record whether you wish to decline.

Counsel Gim: In view of that, at the present time I wish to decline to submit the applicants and their parents to a blood test.

Special Inquiry Officer: When you say "at this time" just what did you have in mind?

Counsel Gim: At this hearing. Mr. Chairman, may I ask this: Is the failure of these applicants to submit to a blood test evidence used by the Immigration Service against the applicants?

Special Inquiry Officer: Not in a strict sense but it is just the same as a failure to answer a question may be used as an inference.

Counsel Gim: May this be considered as a reason for excludability?

Special Inquiry Officer: Well, in the past I have had occasions where persons have refused to answer and I have always warned them that under the circumstances I am permitted in this administrative proceeding to draw an inference from their failure to answer. I won't say that I am going to draw such an inference here but it may very well be that I could draw such an inference.

Counsel Schatkin: As a human being you have a certain opinion but as an official your discretion may be limited or your judgment affected one way or another. I think that's another way of putting it.

Special Inquiry Officer: All I can say for the record is that I make this request in the interest of a fair hearing and for no other reason at all and I may draw some inferences from a declination or I may not. I can't say at the moment.

Counsel Gim: Mr. Chairman, pursuant to this letter of November 14, 1953 from myself to Mr. Shaughnessy, which is entered as Exhibit #20 on the record, have you produced the technician or have you available now the technician who con-

ducted the first test of the relators and of their parents?

Special Inquiry Officer: Well, I have available first Dr. Cameron who is in charge of the pathology section in this hospital, if you wish to have him as a witness. If you do not, you can say so now.

Counsel Gim: I would like to have Dr. Cameron as a witness, Mr. Chairman, but I do not believe he is the person who actually conducted the blood test. He may be in the laboratory but I wish to question Dr. Cameron generally as I indicated in my letter but first I would like to have the technician who conducted the blood test of the relators and their parents. This is in accordance with Judge Dimock's order.

Special Inquiry Officer: If you don't wish to question Dr. Cameron at this point I wish to question him and when he is finished if the technicians you wish to examine are available and the United States Public Health Service permits, they will be presented as witnesses. Before I call Dr. Cameron, is there any other matter you wish to take up on the record?

Counsel Gim: First, have you, Mr. Chairman, produced an official of the Immigration Service to testify with regard to the policies of the Service with regard to testing Chinese persons? This request was made in my letter of November 14th and that is also pursuant to Judge Dimock's order and his decision.

Special Inquiry Officer: That happens to be your interpretation of Judge Dimock's order. I find

that it is not necessary to produce an official of the Immigration Service to testify with regard to policy as I feel that it has no bearing on the decision in this case as to whether it is the policy or is not the policy of the Immigration Service to test all Chinese applicants for admission to the United States and I believe when all of the testimony is before me on the question of the blood tests and any other related matter that I should be in a position to make a decision.

Counsel Gim: Mr. Chairman, may I take an exception to your ruling?

Special Inquiry Officer: Yes.

Recess for lunch.

Hearing resumed.

At the request of counsel Gim, Miss Polly Platt was permitted to enter and remain as a friend of the applicants and their family.

Counsel Gim: Mr. Schatkin and I will both cross-examine technicians but not at the same time. Mr. Schatkin will do most of the cross-examining of technicians but there are a few things in the beginning I would like to clarify with the technician. We won't be cross-examining at the same time. There will be one counsel at a given time.

Special Inquiry Officer: Do not accept my permitting you to do this as a precedent for any future action because generally I do not approve

of this form but in this particular case I have no objection.

I understand now from the officials of this hospital that they are ready to make available as a witness one of the technicians, Mr. Frank Monica, who is the only one of the two technicians who is still employed in this hospital and I have him here now as a witness. I offer him for your examination prior to bringing Dr. Cameron here to testify. I might note, Mr. Gim, that Douglas Bush, the technician who took the first series of tests is no longer employed by the United States Public Health Service and he is not available at the present time. I have obtained his home address which is 704 Henderson Avenue, Staten Island, New York.

Counsel Gim: Mr. Chairman, may I state for the record that according to Judge Dimock's order it is specified that the technician who conducted the blood test be produced and that would include all technicians on all the tests. May I ask in view of that whether or not you intend to have Mr. Bush, whom you say is the person who took the first test, whether or not you intend to have him present today?

Special Inquiry Officer: Not today. However, if you do want to have him as a witness after we have heard Mr. Monica and Dr. Cameron and I cannot obtain his voluntary appearance I will, of course, entertain a request by you that he be subpoenaed for that purpose.

Counsel Gim: I request that Mr. Bush be subpoenaed.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Special Inquiry Officer: Well, I will take that into consideration and rule upon it after we have heard Mr. Monica and Dr. Cameron.

Special Inquiry Officer to witness:

Q. What is your full name and position at this hospital? A. Frank Monica, transfusionist, and I do such things as the regular blood bank tests.

Q. Would you please stand and raise your right hand to be sworn. Do you solemnly swear that all the testimony you will give at this hearing will be the truth, the whole truth and nothing but the truth, so help you God? A. I do.

Q. How long have you been employed at this hospital? A. Eight years.

Q. As part of your regular work do you examine blood for the purpose of determining grouping, type and RH and MN factors? A. That's right.

Q. How long have you been doing that sort of work? A. Well, the MN type I have just been doing this about the past year or so.

Q. How about the RH type? A. RH about six years.

Q. And blood groupings? A. The same, about six years.

Q. During the past six years could you estimate how many blood groupings and RH checks you have done? A. Probably in the thousands, I suppose.

Q. And who is your immediate supervisor? A. Mr. Valentine Connolly.

Q. And who is in charge of your entire section? A. Dr. Cameron is the Chief in charge.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. I show you what is now part of Exhibit #1 in this hearing, five forms called Standard Form 514-B and I ask you whether these five forms which appear to have been dated in August and apparently in the year 1952, whether all of these five forms are in your handwriting? A. That's right.

Q. On the line that says "signature" is that your initials? A. Yes, that's my initials.

Q. On some of these forms I notice that you followed a different practice than that of another technician in this hospital and you indicated your M and MN classifications on the same line as the RH type so that some confusion existed because of that. A. Yes. That was brought to my attention that the MN type should not go on the same line as the RH type and consequently I changed it later on.

Q. In other words, your notations about plus MN and plus N have nothing to do with the RH type? A. Just the plus has but the plus refers to the RH type. The MN is a separate blood type and should not go on the same line.

Q. Then at any place where the plus sign appears that relates to the RH type? A. That's right.

Q. I also note on these forms in the space provided for other tests or examinations and remarks certain notations. Could you explain what those are? A. The numbers here designate the control number of the serum in use.

Q. That is merely for identifying whose blood you are working on? A. No, the lot number of the serum I'm working with but nothing to do with the patient.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Does it have any significance at all in test results? A. In relation to the—if there is any question as to the validity and the type of serum, it might. That is, if it is outdated.

Q. You mean this indicates what bottle of serum you used? A. That's correct.

Q. And it has no other purpose? A. No.

Q. Did you know Mr. Douglas Bush? A. Yes, I did.

Q. Did he work with you in the laboratory? A. Yes, he used to fill in when I was absent.

Q. Did you ever work with him at the same time? A. No, we never worked together in the same department.

Q. Have you ever seen him place his initials or name on any form while working here so that you would be able to recognize it if shown it? A. I couldn't say.

Special Inquiry Officer to Counsel Gim: Do you wish to question this witness?

Counsel Gim: Yes.

Counsel Gim to witness:

Q. Mr. Monica, you say you have been here eight years? A. Yes.

Q. Were you here last June, physically present here at the United States Public Health Hospital? A. I don't remember when my vacation came up last year but if it wasn't during my vacation I was here.

Q. Outside of your vacation you would normally be present? A. Yes.

Q. Was your vacation in July or August? A. I can't think at the moment.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Do you have any records which would indicate when your vacation was? A. It would be upstairs, of course—let me see—I believe it was in June if I'm not mistaken. It might have been June.

Q. Were you here in July? A. Yes.

Q. Were you here in August? A. Yes.

Q. In those two months were you here every day? A. To the best of my knowledge, yes.

Q. Were there any days when you took off sick or other reasons? A. I don't remember if I did, no.

Q. Mr. Monica, when you conduct blood tests you write down the results on this Standard Form 514-B, is that right? A. Yes.

Q. Do you write the person's name down? A. Yes.

Q. Where do you get the name from? A. Usually I had a blank—rather, a typewritten piece of paper and I add the names of people who had blood tests.

Q. Where did you get this list from? A. From Ellis Island.

Q. Do you call out the names for the persons to be tested or does someone else do that? A. I do.

Q. Do you remember seeing any one of these people here? A. Yes, I remember them.

Q. Which ones do you remember? A. I remember the man and the woman.

Special Inquiry Officer: Let the record reflect that the witness is indicating the parents.

Witness: And the young fellow there seems familiar but I can't say for sure.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Counsel Gim to witness:

Q. You are not positive whether you saw the young—you mean this young man? (Indicating Lee Kum Hoy). A. No.

Q. You don't recall whether you saw him before? A. I'm not sure.

Q. How about the girl? Do you recall whether you saw her before? A. No.

Q. You don't recall seeing her before? A. No, I don't.

Q. Now, do you ever recall seeing this boy here? A. He looks a little more familiar.

Q. Is he familiar enough so that you recall definitely seeing him? A. No, I couldn't say that.

Q. So as far as you are concerned, you are not sure whether you took the blood tests from these three children or not? A. That's right.

Q. Now, when you conduct blood tests are there several people being tested at one time? A. Yes, usually more than one, depending on the group that came over from Ellis Island. It's seldom one person.

Q. Now, Mr. Monica, would you write Wong Tew Hee down—print it.

Witness complies

Q. Would you print Lee Ha next.

Witness complies

Q. Would you print Lee Kum Cherk.

Witness complies

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Would you print Lee Kum Hoy.

Witness complies

Q. Print Lee Moon Wah.

Witness complies

Q. Mr. Monica, when you finished testing for the blood types, I believe you testified that you put your initials down on the bottom of the card where it says "signature"? A. That's right.

Q. Would you write your normal initials, the way you normally write your initials. A. You mean as I would upon finishing a test?

Q. Yes, that's right.

Witness complies.

Q. Is this how you normally write your initials? A. That's right.

Q. Would you write it a few more times, the way you normally write your initials.

Witness complies.

Q. Do you recall, Mr. Monica, when you conducted this blood test of these patients were there other Chinese present? A. I really don't remember.

Q. Do you recall whether or not there was an interpreter present? A. No, I don't remember that, either.

Q. But you do recall that at various times you have

a number of people present when you conduct blood tests? A. That's right.

Q. I don't remember—did you testify that you called out the names? A. Yes.

Q. Are you an expert on pronouncing Chinese names? A. No, I'm not.

Counsel Schatkin to witness:

Q. You say that definitely you can identify Mr. Lee Ha? A. Yes.

Q. You know you took a sample of his blood? A. I remember seeing him.

Q. At the time—do you remember this test that was carried out August, 1952? You remember? Mr. Monica, look at your cards and these cards refer to tests carried out in August, 1952, so that might help you remember. A. This is my work all right.

Q. In other words, that is your work, right? A. Yes.

Q. And you see your initials there, and so forth? A. Yes.

Q. So that means you are pretty well satisfied that you did carry out the test in August, 1952? A. That's right.

Q. Do you recall Mr. Lee Ha? A. I remember him definitely.

Q. When you say you remember him would you say that you—withdrawn. In carrying out these tests, particularly, August, 1952, did you yourself draw the sample of blood? A. Yes, I was the only one drawing blood at the time.

Q. Did you draw a sample of blood from this man?

(Indicating Mr. Lee Ha) A. If my initials are on the paper I drew the blood.

Q. Your initials are on the paper. Look—is that your initial on the paper? This is the card of Lee Ha. A. Yes, I drew his blood.

Q. Then you drew the blood from Mr. Lee Ha? A. Yes.

Q. And the same thing applies to his wife whose name is Wong Tew Hee? Did you draw a specimen of her blood? A. If my name is there I did.

Q. Well, here it is, Wong Tew Hee. A. Yes.

Q. How about this young man here, Lee Kum Cherk. Will you look at the card of Lee Kum Cherk. A. Yes.

Q. Would you say you draw a sample of blood from Lee Kum Cherk? A. Yes.

Q. But you don't remember him independently of this card, do you? A. He looks familiar.

Q. Unless you had referred to this card you couldn't swear you drew a specimen of this blood? A. No.

Q. How about this girl here? Her name is Lee Moon Wah. Here is her card. A. I drew this blood.

Q. You say now you drew the specimen of her blood? A. Yes.

Q. Could you know that without the benefit of this card just by looking at her now? A. No.

Q. You have to refer to the card? A. Yes, I would.

Q. And the same thing applies to the other young man? A. Yes, that's right.

Q. At the time you drew the sample of blood how many people were here, how many Chinese people from Ellis Island? A. I don't remember the size of the group that came.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. It was more than these three or four people. Approximately? A. I don't remember.

Q. Look at this card now. Referring to the same cards in August—look at these cards again. There was a time when your practice was to enter that room and call out the name of the individual, right? A. Yes.

Q. You have already identified these five cards? A. Yes.

Q. You called out the name of Lee Ha, didn't you? Apparently you must have. A. Yes.

Q. When you called out the name of Lee Ha did this man step forward? A. I don't remember who came forward when I called the name.

Q. When you called the name of Lee Ha did Mr. Lee Ha come forward and did you then draw a sample of his blood? A. I don't remember.

Q. And when the lady here, Wong Tee Hee— you called the name Wong Tee Hee apparently. A. Yes.

Q. Can you now say that this is the lady who came forward and you drew a specimen of her blood? A. I couldn't say that.

Q. And the same answer applies to the three young people here, the children? A. That's correct.

Q. Were there many other people in the room at that time? A. I don't remember.

Q. But you know that you did draw blood samples of some people? A. That's right.

Q. And after—are you a licensed physician? A. No, I'm not.

Q. And will you tell us please what institutions of learn-

ing you attended or graduated from? A. Well, I attended and I'm still attending Wagner College.

Q. What courses do you take in Wagner College. A. Courses in medical technology.

Q. Have you attended any other schools? A. Long Island University in 1940 and 1941.

Q. You have attended several colleges? A. Yes.

Q. At least those two? A. Yes.

Q. Do you hold any degrees of any institutions? A. No.

Q. And are you a member of any scientific bodies or societies? A. No.

Q. Have you had any papers published on the subject or blood groups or types? A. No.

Q. You haven't contributed to any scientific periodicals on the subject of the work you are engaged in? A. No.

Q. Have you ever studied under any blood test experts like Dr. Wiener or Dr. S ssman or Levine? A. No.

Q. Tell me this, before I forget: Will you take a look at these—I am referring now to five cards that are dated in July, 1952—now, there is an initial on the lower right hand corner. Can you tell us whose initial that is on the card of Lee Moon Wah, July, 1952? A. It's not my initial.

Q. Is that D. B.? A. It appears to be.

Q. It appears to be, doesn't it? A. Yes.

Q. Here is another one which looks very much the same, almost similar, referring to a July, 1952 card of Lee Kum Hoy. Isn't that D. B.? A. It appears to be.

Special Inquiry: In order to save you the trouble, counsel, of going through the cards I have typewritten copies which I have not offered in evi-

dence and the full name of Douglas Bush is typed on three of the tests dated in July.

Counsel Schatkin: And then there are two marked N. Y.

Special Inquiry Officer: If you will show those to Mr. Monica and ask him to identify those,——

Witness: Those are my initials.

Counsel Schatkin to witness:

Q. Is that F. M. or N. Y.? A. That's F. M.

Q. Then you must have carried out these tests. You must have carried out two tests in July, 1952 on Lee Ha and Wong Tew Hee? A. Apparently because that is my handwriting.

Q. Apparently, if you—I'm going to show you two cards, one in July, 1952 and one of August, 1952 on Lee Ha and you will see here that you changed—that the original July, 1952 as to the card of Lee Ha says that he belongs to type M and in August, 1952 belongs to MN. A. Yes.

Q. In other words, there is an affiliation between the two? A. Yes.

Q. But there is no change as to the AB group, is there? A. No.

Q. Which is correct, Mr. Monica? A. Which one of the two?

Q. Can you tell us which type Mr. Lee Ha belongs to? A. From the basis of what happened at the time I would say that his type is A, MN.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. So that the type of M in July, 1952 by you was not correct? A. That's correct.

Q. So would you say you did make an error regard the M type of Lee Ha in July, 1952? A. That's right.

Q. Now, will you also look at the card for Hee Tew Wong and the other one says Wong Tew Hee. This was done by you apparently and tell me if I'm wrong, in July, 1952 you reported that this woman belonged to type M and in August, 1952 you reported that she belonged to type MN. A. That's right, I did those tests.

Q. Which would you say is the right report? A. To the best of my knowledge I would say—there is no date on this one—I would say the August one is correct.

Q. Is there any special reason why you say the August one is correct? A. Well, we had some trouble with the serum. Our tests were not coming out correctly. The weather appeared to have a lot to do with the tests. During the heat of the summer months the N serum seemed to be less potent than it should have been.

Q. Well, would you say that you were in error then as to reporting the M type for Hee Tew Wong in July 1952? A. If the later type is MN, that is correct.

Q. It was a personal error? A. That's right.

Q. After you draw the blood samples how much—you have testified you drew the blood samples in July, 1952 from these people?

A. Right.

Q. How many centimeters did you draw from each individual? A. Approximately five centimeters.

Q. From each, from the vein located near the elbow? A. That's right.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q In August, 1952 how large a sample did you draw from these people? A. To the best of my knowledge I always drew five centimeters.

Q. Is it possible that you only drew a few drops of blood on the second test? A. I don't believe so.

Q. Could it be possible that you drew only a few drops in order to spare them too much concern? A. No. In order to do the test you have to draw a sufficient quantity, more than two centimeters.

Q. After you drew a sample, what did you proceed to do in July, 1952 after drawing the sample? Did you immediately label the tubes? A. Yes.

Q. And what method did you use for labeling the tubes? A. I wrap the original paper with the person's name around the tube of blood that I drew.

Q. And then what did you do after that? A. Soon after that I put a gum-label on the tube with the patient's name on it.

Q. Who actually carried out the test? A. I did.

Q. And you found an exclusion in July, 1952 on the AB groups, is that correct?

Special Inquiry Officer: I don't follow that.

Counsel Schatkin to witness:

Q. Did you know the result of the test when you saw it? A. I don't understand.

Special Inquiry Officer: I don't understand you either, Mr. Schatkin.

Counsel Schatkin to witness:

Q. I mean you carried out the test? A. Yes.

Q. And you arrived at a certain result? A. Yes.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. What was the result you arrived at in July? A. Whatever is down there.

Special Inquiry Officer: May I say, Mr. Schatkin, that Mr. Monica as far as I know makes no conclusions from these tests. He makes the test and they are sent to our Service or the Public Health Service for their information.

Counsel Schatkin to witness:

Q. Are you familiar with the laws of the inheritance of the blood types? A. Not fully.

Q. Do you realize that on the basis of the July blood test of all the five individuals and further in view of the fact that Lee Ha was reported by you as belonging to type M and the wife of this man, Wong Tew Hee as belonging to type M according to your July reports, on the basis of the MN element two children were excluded right there, apart from the AB's. Now, do you realize that? A. Yes.

Q. In other words, in the July test the three children or the two children were excluded from being the possible off-spring, not only by the AB groups but the MN types. A. The AB's are the same.

Special Inquiry Officer: I don't approve of this cross-examination. This gentleman is not offered as an expert. He said he doesn't pretend to be or offer to be one and I see no point in asking him questions with relations to the results of these tests.

Counsel Schatkin to witness:

Q. Do you carry out the blood test yourself? A. I do.

Q. And then you hand up a routine report? A. Yes.
Q. Do you examine the blood with a microscope? A. As far as the types and the MN types, yes.

Counsel Gim to witness:

Q. Is it possible where you could have taken the blood and Mr. Bush perhaps may have looked in the microscope to determine the results? A. I completed the test.

Counsel Schatkin to witness:

Q. From the time you drew the blood sample until the result is made you carried out the whole process? A. Yes.

Counsel Gim to witness:

Q. And there are no exceptions to that? A. No exceptions to that.

Counsel Gim: That's all.
Counsel Schatkin: That's all I have.

Special Inquiry Officer to witness:

Q. Mr. Monica, when you have taken five centimeters of blood from any person, how many samples or portions of that five centimeters do you look at before you make a determination? Is it divided into smaller groups? A. The MN groups have to be transferred to another tube of saline and also the AB groupings have to be transferred to a saline.
Q. I mean in order to determine the blood group AB is, etc., just what do you do? A. I would take

a drop of blood from the original tube which is oxalated and you transfer a drop of that blood to another tube containing approximately two or three centimeters of normal saline to get a red-cell suspension and I would transfer two drops of the self-suspension to a slide, one drop on each side and divide the slide in half with a grease pencil to prevent the fluids from running together and I would add a drop of anti-A serum on one side and a drop of anti-B serum on another side and I would mix them separately with a toothpick and examine them about five minutes later and the same applies to the MN types. Instead of serum I would use an anti-M powder for the M type and an anti-N powder for the N type and I would mix those separately and observe not less than ten minutes later after manipulating the slide to insure any agglutination, if any.

Q. Now, when they refer to RH types are they only positive and negatives? A. Yes, that's right.

Q. Is that determined in approximately the same manner? A. No. In that case the whole blood has to be used. That's why it's drawn originally that way. You can't use saline suspensions of the blood in that case. In this type a drop of whole blood has to be on the slide and a ring is made around the drop of blood to prevent it from spilling and a drop of anti-RH serum is mixed with the blood and put on a warm glass slide and rocked back and forth for a period of about three minutes, after which agglutination should or should not appear, depending on the type.

Q. I notice on these standard forms 514-B that there has been a change in the form and that at one time the

RH is referred to as a factor and now it is referred to as a type. What is the current terminology? A. As far as I know it is still RH type.

Q. When someone refers to RH factor it means the same thing? A. Yes.

Q. I also notice that there is a change in the A-B-O-, etc., from blood type to blood group? A. Well, I believe all current literature classifies it as blood group.

Q. When they do refer to blood type it is what is now known as blood group? A. Yes.

Q. The MN factors, are they always referred to as blood groups? A. I believe so, yes.

Q. It is also referred to as a factor? A. Yes, it's called a factor.

Q. Is it ever referred to as a blood type? A. Possibly could, yes.

Q. The present term is to refer to MN as a blood group? A. Yes.

Q. Could it be confused with the terminology of A-B-O or is that excluded because different letters are used entirely? A. It should not be included within the A-B-O system.

Counsel Schatkin to witness:

Q. Mr. Monica, I don't know whether you really mean it, mean to refer to the MN as a blood group. It's never referred to as a blood group, is it? You have never heard the MN group section, always the MN type. A. I believe so.

Q. The groups are the AB? A. Yes.

Q. Let me ask you this: You only test for RH positive and RH negative? A. That's right.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. If you did use the sub-types of the RH you would increase the chances of getting an exclusion of 20 per cent, is that right? In other words, if your laboratory was equipped to conduct a complete RH test your chances would be increased in about 20 per cent of getting an exclusion, is that right? A. Yes.

Q. But that's a very difficult test, right? A. No, I don't believe it is so difficult.

Q. The only purpose of RH types is to detect non-paternity although it can be used for transfusion purposes? A. Mainly for transfusion purposes.

Counsel Schatkin: That's all.

Counsel Gim to witness:

Q. Your department is not specially geared to set up tests for paternity cases, is that right? The primary purposes is for transfusion? A. Yes.

Counsel Gim: That's all.

Special Inquiry Officer to Witness: Thank you, Mr. Monica.

Special Inquiry Officer to next witness:

Q. What is your full name and title? A. George F. Cameron, Jr., Medical Director, U. S. Public Health Service, Chief, Department of Pathology.

Q. Would you please stand and raise your right hand. Do you solemnly swear that all the testimony you will give will be the truth, the whole truth and nothing but the truth, so help you God? A. I do.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. The Immigration Service received a letter dated November 6, 1953 which I show you and ask you if this is your signature? A. Yes, it is.

Special Inquiry Officer: Letter on the stationery of the Department of Health, Education and Welfare, Public Health Service Hospital, Staten Island, New York, dated November 6, 1953, signed by Dr. George F. Cameron, together with ten forms 514-B attached thereto, are now entered into evidence in toto as Exhibit #22.

Counsel Gim: I have no objection to it.

Special Inquiry Officer to Witness:

Q. Doctor, did you have at one time an employee under your supervision by the name of Douglas Bush? A. Yes.

Q. I understand he is no longer with the United States Public Health Service, is that correct? A. That's right.

Q. Was he a full-time employee? A. Yes, he was a full-time medical technician in our department.

Q. And how long is it since he is gone from here? A. A few months.

Q. Was there any particular reason for his leaving the service? A. Yes, but I don't think it has much to do with this.

Q. I was merely seeking to determine whether he was dismissed or whether he was reduced in force. A. He was dismissed.

Q. I notice that these forms, the standard form 514-B have been changed slightly in recent years and different

wording is used. Is it now your practice to refer to A-B-O positive as a blood group rather than a blood type? A. To me the two terms are practically synonymous. It is usually referred to as blood group.

Q. And the RH factor has been changed to RH type? A. Yes.

Q. And how do you refer to the MN test? A. Well, perhaps most of the literature says that they are types. Some of it says that they are groups but perhaps more carefully they should refer to it as types.

Q. You are using the terminology "groups" on these forms, is that your practice here? A. Yes.

Special Inquiry Officer: You may question the doctor.

Counsel Gim to Witness:

Q. Dr. Cameron, how long have you been in charge of the Pathology Department here at the United States Public Health Service Hospital? A. About a year and a couple of months.

Q. And if you know, when did you begin conducting blood tests for the purpose of proving or disproving paternity? A. Last year—I believe it was June, 1952.

Q. Doctor, I show you a copy of a circular from the Federal Security Agency dated May 8, 1952. The subject is Blood-Type Testing on Request of the Immigration and Naturalization Service. I show you this and ask you if you ever have seen that before? A. Yes, I have the original copy sent to me.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Counsel Gim: Now, Mr. Chairman, may I offer this letter in evidence?

Special Inquiry Officer: Copy of letter headed Federal Security Agency, Public Health Service, Washington, D. C., dated May 8, 1952, is entered into evidence as Exhibit #23.

Counsel Gim to witness:

Q. Would you read this letter Familiarize yourself with the contents. Refresh your recollection, doctor.

Witness complies

Q. You have refreshed your recollection on the contents of this letter? A. Yes.

Q. Doctor, was it after you received this circular that you began conducting blood tests on behalf of the Immigration Service? A. Yes.

Q. Prior to that you did not conduct blood tests for the purpose of disproving paternity, is that right? A. Not to my knowledge.

Q. As far as you were concerned this was by authorization to conduct blood tests for the Immigration Service, is that right? A. Yes.

Q. Do you recall in reading this circular whether or not this circular directed the testing of any particular race of people? A. It says for the blood type of certain United States citizens of Chinese descent.

Q. It doesn't mention United States citizens of any other type of racial descent, does it? A. No, I don't see it.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. So that as far as you were concerned this authorized you to conduct blood tests for certain United States citizens of Chinese descent, is that right? A. Yes.

Q. After you received this circular did you receive any other circulars from the Federal Security Agency directing you to conduct blood tests of United States citizens of other than Chinese descent? A. No.

Q. So you have no other instructions from the Federal Security Agency outside of this circular of May 8th in so far as blood tests for the purpose of proving paternity?

A. I have one other circular but it does not say anything about descent. It says something about who to pay the money to, the $2.

Q. Do you mind letting me see that? A. If I can find it.

Q. Do you have any objection to my seeing that, doctor? A. No, not at all.

Q. Doctor, since the receipt of this circular of May 8, 1952, just what is your estimate as to how many Chinese persons have been tested at your facilities? A. About 200.

Q. This is all for the purpose of proving or disproving paternity, is that right? A. As far as I know, yes.

Q. How many persons of races other than Chinese have been tested for the purposes of proving or disproving paternity? A. None as far as I know.

Q. And you conducted the blood tests for the Chinese because you felt you were authorized by the circular of the Federal Security Agency, is that right? A. I felt I was directed to do it.

Q. In this circular which I have referred to? A. Yes.

Q. Doctor, do you still conduct blood tests for the Immigration Service in these Chinese cases? A. Yes, if we are asked to.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. Do you recall the last time you were asked? A. I believe in June, 1953.

Q. Doctor, are you aware that the Immigration Service has since June, 1953 asked other private persons to conduct blood tests in their cases? A. Yes.

Q. Do you know of any particular reason for that change in policy? A. No.

Counsel Schatkin to witness:

Q. Doctor, is your laboratory still carrying out these tests? A. Yes.

Q. Have you carried out any of these tests since June of this year? A. No.

Q. Is it not a fact that since June, 1953 you have been referring these blood tests to a panel of physicians, private physicians? A. No.

Q. Has the Immigration Service at Ellis Island referred any such cases to you for blood tests since June, 1953? A. No.

Q. Do you happen to know whether or not the Immigration Service has referred such cases to other doctors? A. That I don't know.

Q. Dr. Cameron, is this not a copy of a communication dated January 7, 1953 you composed? A. That's right.

Counsel Schatkin: This is offered in evidence.

Special Inquiry Officer: Copy of letter dated January 7, 1953, written by Dr. George F. Cameron to the Immigration Service is entered into evidence as Exhibit #24.

Counsel Schatkin to witness:

Q. Dr. Cameron, is it not a fact that Frank Monica

who is a transfusionist who was here today has been working under your direction? A. That's right.

Q. Is it not a fact that up until the time he was dismissed Douglas Bush worked in the laboratory under your direction? A. That's right.

Q. Is there any special reason why you don't care to mention why he was dismissed? A. It has no bearing on his work. It has some bearing on his character.

Q. Not on his competence? A. Not on his competence at all.

Q. Am I right in saying, Dr. Cameron, that you would prefer to have these tests done by a recognized expert than your own laboratory? A. By all means.

Q. And is there any special reason for that answer? A. Yes, there is. I have written through the Medical Officer in Charge to the Division of Hospitals from whence this circular #52-66 originated that I do have certain definite objections to it and to sum it all up our hospital laboratory is equipped to do tests of diagnostic importance to the patient but not equipped to do tests which would have medical-legal authenticity.

Q. In other words you are equipped to do blood tests for clinical purposes for the patient? A. Yes.

Q. Are you acquainted with Dr. Leon Sussman? A. No.

Q. You say you are not equipped to do— A. When I say I'm not equipped to do the test I mean we don't have what I consider a special room, a special technician, a special system for doing these tests which would obviate all legal doubt that the thing is valid. We have one technician doing that and other tests at the same time. We have to conduct the test in a room which is more or less open to the public. We have to send the thing

through our secretary who is doing many other things at one time and I think there is a possibility of error which may creep in when somebody is not doing these tests alone.

Q. When you say you are not equipped to do this for medical-legal purposes you are referring to paternity exclusions? A. Paternity exclusion I think is a medical-legal thing.

Q. In other words, the blood tests that your laboratory had been carrying out say from June, 1952 to May or June, 1953 were done by the transfusionist? A. Yes.

Q. By a man who was not giving full time to the medical-legal aspect, is that right? A. Yes.

Q. He was giving most of his time, right? A. To the typing and cross-typing of hospital patients for transfusion purposes and getting blood from donors.

Q. And you believe that that condition may have been responsible for a number of errors? A. I think so.

Counsel Schatkin: That's all.

Special Inquiry Officer to witness:

Q. Doctor, Mr. Monica mentioned previously that when shown that he had himself changed the MN classification of the parents involved in this case between July and August, that he believed it was due to the serum being used, that it was defective possibly due to the heat at that time. Did you know of that condition last summer or did you learn of it subsequently? A. Of what condition?

Q. Of the serum being used in some cases which caused errors to creep in the MN test. A. I don't know that the serum was defective.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Q. In so far as determining any person's blood group, and I refer only to A-B-O, etc., is that a test that would have to be conducted by a doctor? A. No.

Q. Could a technician who has handled this work for a number of years be able to determine that without too great difficulty? A. Yes.

Q. On that test alone, is your laboratory equipped to determine a person's A, B or O group? A. Yes.

Q. Do you feel on that factor alone you would be prepared to stand by your conclusions even from a medical-legal point of view? A. No, I don't think so.

Q. Is a determination by a technician of whether a person has A or B or [illegible] blood a difficult test to carry out or is it just that you feel that the errors that may creep in because of his other duties are possible? A. It's not a difficult test to do. It's the errors that would creep in because of his other duties and other things that I have mentioned.

Special Inquiry Officer: Thank you, doctor.

Is there anything further, counsel?

Counsel Gim: No further questions.

Counsel Schatkin: No further questions.

Special Inquiry Officer: Mr. Gim, at this point have you made any determination about the question of producing Mr. Bush?

Counsel Schatkin: May I confer with Mr. Gim a moment, please?

Special Inquiry Officer: Yes.

Counsel Gim: Mr. Chairman, after consulting with my co-counsel we will waive the request to have Mr. Bush present.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Special Inquiry Officer: Do you wish to question the applicants at this time?

Counsel Gim: Yes, I do, Mr. Chairman.

Special Inquiry Officer: Which applicant?

Counsel Gim: Mr. Lee Kum Hoy.

Counsel Gim to applicant (through interpreter):

Q. Mr. Hoy, do you remember when you first came to the Unitel States in June, 1952? A. Yes.

Q. Now, do you recall the date when you and your brother and sister came over to this hospital? A. I recall about two weeks after my arrival in the United States and I came to this hospital for blood test.

Q. Now, at the time when you first came for the first blood test who asked you to come to this hospital? A. The Immigration officers.

Q. An Immigration officer told you and your brother and sister to come to the hospital, is that right? A. Yes.

Q. As a matter of fact, when you were coming to this hospital, that is, you and your brother and sister, when you were coming with the Immigration officer, did you know why you were coming here? A. No, I didn't know.

Q. So you had no idea why you were coming to the hospital here? A. Yes, that's right.

Q. Did the Immigration officer ever ask you whether or not you wanted to take a blood test voluntarily? A. No.

Q. You were never advised that the blood test would be voluntary on your part? A. No.

Q. And when you went up to the man to have your blood taken from your arm, did you know what that was for? A. No.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302.

Q. Did any Immigration officer tell you that you didn't have to go if you didn't want to? A. No.

Q. And you did what you were told by the Immigration officer—that is, you put your arm forward and had the blood test taken because you thought you were required by law to do that; is that right? A. Yes.

Q. When the Immigration officer told you to come with him to the hospital, did you think that the Immigration officer was giving you orders as required by law? A. Yes.

Counsel Gim: That's all, Mr. Chairman.

Special Inquiry Officer. Anything further of the other applicants or any other witnesses?

Counsel Gim: I would like to question the father.

Special Inquiry Officer to witness:

Q. What is your name? A. Lee Ha.

Q. Would you please stand and raise your right hand. Do you solemnly swear that the testimony you will give will be the truth, the whole truth and nothing but the truth, so help you God? A. I do.

Special Inquiry Officer: You may proceed.

Counsel Gim to witness:

Q. Mr. Lee, do you remember the first time you came here for a blood test? A. Yes.

Q. How did you come over here to have a blood sample taken? Who told you to come over here to have your

blood sample taken? A. The Immigration officer who is dead now. I asked him was it necessary for me to have the blood test and he said it was necessary.

Q. Did the Immigration officer indicate to you that the blood test was required legally? A. Mr. Yung told me that I had to have my blood test because I do not speak English and I had to talk through Mr. Yung.

Q. Mr. Yung is an official interpreter for the Immigration Service, is he not? A. Yes.

Q. And he told you this in the presence of the Immigration officer, did he not? A. Yes.

Q. Now, that is both you and your wife were present when the Immigration officer told you to come for the blood test, is that right? A. Yes.

Q. Did you at any time volunteer on your own initiative to take the blood test? A. No.

Counsel Gim: That's all the questions I have.

Special Inquiry Officer: Anything further, counsel?

Counsel Gim: I want to present the witness Wong Tew Hee.

Special Inquiry Officer to witness:

Q. Will you please stand and raise your right hand. Do you solemnly swear that the testimony you will give will be the truth, the whole truth and nothing but the truth, so help you God? A. I do.

Special Inquiry Officer: You may proceed.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Counsel G. n to witness:

Q. Mrs. Lee, I show you this document. Will you look at that document.

(Witness complies.)

A. It is a certificate issued by the Toishan district for the purpose of my coming to the United States.

Q. Mrs. Lee, did you get that in person from the government official? A. Yes.

Counsel Gim: Mr. Chairman, may I offer this document in evidence and ask the interpreter to translate it?

Special Inquiry Officer: If you have no objection I will not have him translate it for the record now but he can prepare a certified copy of his interpretation which will be made a part of this record at a later time.

Counsel Gim: All right, Mr. Chairman.

Special Inquiry Officer: This document which you offer is a photostat. Do you have the original available?

Counsel Gim: No, I do not.

Special Inquiry Officer: Do you know where the original is or are you just offering this photostat in evidence in this form without any further identification.

Counsel Gim: I offer the photostat as the second best evidence of the original document.

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

Special Inquiry Officer to witness:

Q. Did you have the original of this document in your possession at one time? A. I think my former lawyer, Mr. Sam Bernstein, has it.

Special Inquiry Officer: Photostatic copy of document, original of which is not now before me but which was apparently exhibited at the previous hearing as is indicated on page 17, is entered into evidence as Exhibit #25.

Is it agreeable to you that a certified translation of this document be obtained and that it be added to this exhibit as part of Exhibit #25 without the further appearance of the applicant?

Counsel Gim: Yes.

Special Inquiry Officer: Certified translation will be made a part of Exhibit #25.

Do you wish to question this witness further?

Counsel Gim: No.

Special Inquiry Officer to witness:

Q. When did you get the original of this document? A. Since my children and I have been detained for so long I feel everything confused. I can't remember.

Q. Did you get this shortly before you left China to come to the United States? A. Yes.

Q. And all of the facts recited in here as to your marriage and when your children were born, was that information you gave to the official to put into this record or did he have other records from which he got this in-

formation? A. The government office has all the records of the date of birth of my children because every time that my children were born I had to report to them.

Q. Where was this document obtained by you, in what place? A. The District of Toishan.

Q. Where is that located? A. In Toishan City.

Q. How far is Hoy Chew Village from Toishan? A. Hoy Chew Village is my native village and it's about five po from the Toishan District.

Q. And how far is Lung Woy? A. At least 2 pos.

Q. And how far is Fung Gong Village? A. A little more than 2 pos.

Special Inquiry Officer: Anything further?

Counsel Gim: Nothing further. I believe, Mr. Chairman, that the blood test reports are unworthy of belief as substantiated by the testimony of Dr. Sussman and corroborated by the testimony of Dr. Cameron. Secondly, I protest to the taking of the blood test on the ground that as the testimony of the witnesses has indicated they were taken involuntarily and without any authority in law or regulations. Third, I object to these blood tests, Mr. Chairman, because they are racially discriminatory as borne out by the testimony of Dr. Cameron in that no persons other than Chinese have been tested. I further wish to affirm my previous objection to the fact that the Immigration Service has failed to produce an official to testify with regard to the policy of requiring Chinese to take blood tests in contradiction of Judge Dimock's

order and Judge Dimock's decision. Finally, I feel that the blood test in this case constitutes an unreasonable search and seizure both as to the parents and the children in violation of the Constitution.

Special Inquiry Officer: I will not at this time make my decision in this case. Right after I have had an opportunity to briefly study the testimony today and the new exhibits as well as the previous record with greater particularity I will make my decision in writing and it will be served upon you as attorney for the applicants, at which time, if it should be unfavorable, you will be advised of your rights to take exception thereto, which will serve as an appeal to the Board of Immigration Appeals in Washington, D. C. Do you understand that procedure?

Counsel Gim: Yes. I would like a copy of the record as well as the decision.

Special Inquiry Officer: Hearing closed.

I certify the foregoing to be a true and correct transcript of my shorthand notes of the testimony taken by me in the above case.

SHELDON HANDSCHUH
Sheldon Handschuh,
Stenographer

Reopened Board of Special Inquiry Hearing, Commencing November 5, 1953, and Following Judge Dimock's Decision of September, 1953, Reported in 115 F. Supp. 302

I certify that to the best of my knowledge and belief this record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record.

AARON I. MALTIN
Aaron I. Maltin,
Special Inquiry Officer

AIM:sh

Decision of Special Inquiry Officer Dated December 9, 1953

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
New York, N. Y.

Dec 9 1953

Files: 0300-423253
0300-423254
0300-423255

In re: LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH

IN EXCLUSION PROCEEDINGS

IN BEHALF OF APPLICANTS: Benny Gim,
Hong & Gim,
551 5th Avenue,
New York, N. Y.

Sidney R. Schatkin, (Co-Counsel)
100 Center St.,
New York, N. Y.

EXCLUDED: Act of 1924—no immigration visas
E. O. 8766—no passports

APPLICATIONS: Admission as a United States citizen under section 1993 Revised Statutes (Lee Kum Hoy)

Admission as United States citizens under section 201(h) and (g) of the Nationality Act of 1940 (Lee Kum Cherk and Lee Moon Wah)

Decision of Special Inquiry Officer Dated December 9, 1953

DECISION OF THE SPECIAL INQUIRY OFFICER

DISCUSSION:

This case relates to three persons, two boys and a girl, who are seeking admission to the United States as the children of an American citizen. They were previously accorded a hearing by a Board of Special Inquiry and did thereafter appeal to the Board of Immigration Appeals which affirmed the exclusion of the applicants on May 11, 1953. Thereafter the attorneys for the applicants made an application for a writ of habeas corpus in the Southern District Court of New York and the Judge ordered that their hearings be reopened for further evidence. This was done on November 5, 1953 when it was agreed that the case might be heard before me as a Special Inquiry Officer in the place of the Board of Special Inquiry. Hearing was held by me on November 30, 1953 and concluded on that date. In the course of that hearing testimony was taken in the main from an expert medical witness presented by the applicants and from one of the technicians who took most of the blood tests, now Exhibit #1 in these proceedings, and by the doctor at the United States Public Health Service in charge of the pathological section which supervises the work of the technician whose name is Frank Monica.

The expert witness produced on behalf of the applicants was Dr. Leon Sussman, a doctor who specializes in the field of hematology and who examined Exhibit #1 which included the first and second blood tests taken from the applicants and their parents in July and August of 1952. In view of the discrepancies between the findings in those two tests, he states that it is impossible to make a determi-

nation as to the exclusion of parentage. This is only so because of the change of a classification from the first to the second test. Taken independently if he were to assume the accuracy of the test, then he was in agreement that the results would indicate the exclusion as the possible children of the parents in question, Lee Kum Hoy and Lee Moon Wah, because they have blood group B and the parents are both in blood group A. It is noted that the first test of the children Lee Kum Hoy and Lee Moon Wah was taken on July 1, 1952 by a technician, one Douglas Bush, no longer at the United States Public Health Service hospital in Stapleton, Staten Island. His testimony was waived by counsel for the applicants. Subsequently on August 11, 1952 technician Frank Monica took blood tests of the three applicants and he also determined that Lee Kum Hoy and Lee Moon Wah both fell within blood group B. With relation to the parents, Frank Monica tested them on July 17, 1952 and found that they fell into blood group A and he tested them once more on August 13, 1952 and found that they fell within blood group A. Much has been made by counsel for the applicants of the fact that the other blood types or factors noted on the forms, such as the RH Type, the MN Type, were different from one test to the other. However, in order to arrive at a result of the exclusion of paternity in reference to the two children named, it is not necessary to rely to any degree upon the results of the MN or RH tests. There is no evidence before me that the two tests conducted by Douglas Bush and Frank Monica insofar as the AB classification is concerned is in any way an error and I am therefore led to the conclusion that this is the blood group of the two children named and of the parents, in which case they are excluded as not being

the children of the parents as claimed. The expert presented by the applicants has admitted that this is so, assuming the accuracy of the tests which resulted in the classification A and/or B.

Doctor Sussman has testified that when blood tests are run by his laboratory and under his supervision, that certain safeguards and methods of operation are used. He has stated that if on some occasions the tests should indicate a difference of result, a third test would have to be taken by a third technician working independently of the first two and that it would be necessary then to find out why the original test as taken by two different technicians turned out with a different result. He has indicated that the possibility of error exists for several reasons. First, human error; second, the possibility that the serum used may be not in as good condition as is necessary, and this is broken down into two categories, that of the strength of the serum which deteriorates with age and the accuracy of the serum. Because of the latter possible defect he states that most experts prepare their own serum and do not rely upon the commercial type of serum sold. However, he did state that the commercial serum for determining the AB blood groups are considered satisfactory by members of the medical profession and that special serum is not used in that case. He has also stated that of the three types of tests, the RH, MN, and the AB blood group test, that the AB blood group test is the simpler of the three, the other two being a bit more difficult and requiring a greater degree of experience and technical knowledge for the technician to properly make a determination. From all of the evidence before me it has been determined that the persons taking AB tests would have to be technicians of some experience but would not necessarily have

to be doctors, and that doctors are not used generally for taking AB tests. As a matter of fact, Dr. Sussman employs technicians and merely supervises their work. The United States Public Health Service employees are technicians. Douglas Bush and Frank Monica who are both technicians with the United States Public Health Service under the supervision of a doctor. Frank Monica who ran seven of the ten tests, now part of Exhibit #1, has been doing this work for about eight years and no evidence has been presented to indicate that he does not know his work or that he is not able to correctly make a determination of the AB blood group of persons.

The only question that has arisen was testimony by Dr. Cameron, who is the immediate supervisor of Mr. Monica, to the effect that he personally felt that the conditions under which tests were taken at the hospital were not such that he personally would give them full weight in a medico legal sense. He testified that he was satisfied that the technicians were able to carry out their work and that the work was not difficult insofar at this particular test is concerned but that he felt that Mr. Monica whose principal work was as a transfusionist did not have the opportunity to concentrate completely upon this type of work. He stated that he felt these paternity tests should be surrounded with the greatest care so as to produce the maximum of accuracy. With this statement, one could hardly disagree. Dr. Sussman has described his method of taking blood tests and from his statements I assume that he is engaged or his technicians are engaged almost exclusively in this type of work and therefore do not have their minds disturbed by other considerations and interference with their mental operations. An opportunity was offered to the applicants through counsel to

have a series of tests taken of the three applicants and their parents by Dr. Sussman without any supervision and to then present those tests as evidence in these proceedings. Counsel for the applicants has declined to permit either the applicants or the parents to submit to another blood test. I am therefore left with the evidence before me which consists in the main of Exhibit #1.

From all of the evidence, all that I can see is that there is now before me two series of blood tests taken by the United States Public Health Service which tests both reveal that the children Lee Kum Hoy and Lee Moon Yeh had blood group B and their parents blood g[illegible]. While it is conceded that there is the possibility [illegible]r, Dr. Sussman, the expert presented by the applicants, has conceded that the possibility of human error always exists, a conclusion which almost anyone would draw. Therefore, we can never eliminate this possibility. The only way to fully determine the accuracy of any result is to test and retest it so that any reasonable man would be satisfied with the result. In this particular case two series of tests were taken. Insofar as the AB blood group was concerned they came out the same. No evidence has been offered by the applicants to the contrary. The only evidence which they apparently emphasize is the fact that there is the possibility of error. This was always there so that there has been no change in the evidence before me that would lead me to conclude any differently from what has already been concluded by the Board of Special Inquiry which originally heard this case and by the Board of Immigration Appeals in its decision of May 11, 1953. It must be borne in mind that the burden of proof in these proceedings of establishing that they have the claimed relationship to their alleged father is upon them.

The government has done all that it can to make a proper determination. The applicants have been given full opportunity to bring forward any evidence of their own choosing and to bring countervailing evidence to explain away or derogate from the evidence produced in the course of these proceedings. They have either failed or declined to produce any evidence that would cause me to believe that the tests previously conducted on the two applicants in question and their parents which led to an AB blood grouping and which led to their exclusion as the possible children of the parents in question, is in error.

Another issue has been raised by counsel for the applicants to the effect that there has been discrimination against persons of Chinese descent by the Immigration Service in its determinations of admissibility to the United States. This is predicated upon the fact that it is believed by counsel that as blood-typing tests are only conducted on persons of Chinese descent that this is prejudicial. The history of the Immigration Service reveals that the question of alleged children of United States citizens of Chinese descent has been a constant problem because of the many frauds perpetrated in the past. This has been possible because of the fact that China is one of the few countries in the world that does not maintain statistical bureaus for the recording of the births of children or even of marriages. Therefore, other evidence had to be relied upon in determining these cases. Also, throughout the years it has been found that there has been practically no contact between children and father prior to entering the United States and that in general they were not known to each other except for very brief periods of time. With this background the thought of examining applicants for blood typing probably came to mind. This does not mean

by any stretch of the imagination that this same system could not and has not been used in cases of a similar nature. It just so happens that in no other situation has this question arisen. Almost all persons arriving in the United States have evidence of their birth. A majority of these cases, if not all of them, do not involve United States citizenship in any event. To my personal recollection I have never been presented with a case in all of the years of my service with the Immigration Service that involved the question of the citizenship of children through its parent or parents where some documentary evidence could not be presented. The cases of children born in China are therefore almost always unique, and the fact that the applicants through their counsel have pointed out that blood tests have only been taken at the United States Public Health Service Hospital in Staten Island of Chinese persons, and Dr. Sussman has testified that the persons referred to him have always been of Chinese descent, does not prove that the Immigration Service has not or would not use this same system where it is necessary in the interests of protecting our borders from persons not entitled to enter. It might also be pointed out parenthetically that even if only persons of Chinese descent were so examined at all times in the past, this is not done on the basis of discrimination, most assuredly, but is only done as one of many means of checking the accuracy of information furnished to the Immigration Service to make a proper, fair, and equitable determination.

Counsel also has indicated that these tests, now Exhibit #1, were taken not voluntarily and has offered as evidence of that fact the testimony of the parents that they were told to come to the United States Public Health

Service to have blood tests taken and that it was necessary to do so. The alleged father is a United States citizen. The alleged mother is a legal resident of the United States. The Immigration Service would have no control over them insofar as requiring them to take a blood test. The requirement could only be in the form of a request to assist in a deterimination of a particular case. Insofar as the applicants themselves are concerned I need not pass upon that question as I believe that by the time the second test was taken they as well as their parents must have had some inkling of the nature of the tests and for what reason they were going to be used.

In addition, it would hardly be within my province to decide that forcing these applicants to take a blood test would be a deprivation of their civil rights and in violation of the Constitution. If this be so, although I do not believe it is so, it must be left for the courts to determine that the Immigration Service has violated the Constitution in requiring persons to submit to blood tests.

On the basis of all of the foregoing I make the following findings of fact:

FINDINGS OF FACT:

(1) That all of the applicants are natives of China;

(2) That all of the applicants last arrived in the United States as passengers at the port of New York on June 17, 1952, having started on their journey to the United States from Hong Kong on June 11, 1952, on a plane operated by the Northwest Airlines and having made two changes of planes in Canada en route;

(3) That all applicants are seeking to enter the United States as United States citizens;

(4) That all applicants are in possession of travel affidavits authorized for travel to the United States by an American Consular Officer;

(5) That all applicants are not in possession of immigration visas;

(6) That all of the applicants are not in possession of any passports or travel documents issued by the country in which they were born or to which they owe allegiance;

(7) That all applicants claimed to be citizens of the United States as the children of Lee Ha whose United States citizenship has been conceded by the Immigration Service on previous occasions;

(8) That all applicants claimed that their mother is Tew Hee Wong ~~alleged to be the~~ wife of Lee Ha;

(9) That the testimony of the three applicants and the two witnesses, the alleged parents, has been reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service;

(10) That all of the applicants and their alleged parents have been given blood tests by the United States Public Health Service on two separate occasions in July and August 1952;

(11) That the blood-grouping tests were consistent on both occasions in July and August 1952 as to the

three applicants and the claimed parents, showing each parent to be in blood group A and showing Lee Moon Wah and Lee Kum Hoy to be in blood group B and Lee Kum Cherk to be in blood group O, thus excluding the possibility of the claimed parentage as to Lee Moon Wah and Lee Kum Hoy in accordance with page 684 of Exhibit #2;

(12) That although the claimed parentage is possible in the case of Lee Kum Cherk in accordance with page 684 of Exhibit #2, this applicant's credibility is impeached by the results of the blood test insofar as they affect the claimed parentage of Lee Kum Hoy and Lee Moon Wah;

(13) That on the basis of the blood-grouping tests taken by the United States Public Health Service on two occasions in July and August 1952 it cannot be said that all three of the applicants have established their claimed relationship as the children of Lee Ha and Tew Hee Wong.

CONCLUSION OF LAW:

On the basis of the foregoing findings of fact, I make the following conclusion of law:

(1) That all three applicants are inadmissible to the United States under Section 13(a)(1) of the Immigration Act of 1924 in that they are immigrants not in possession of unexpired immigration visas and not exempt from the presentation thereof under said Act or regulations made thereunder;

(2) That all three applicants are inadmissible to the United States under Executive Order 8766 of June 3, 1941, in that, they are not in possession of passports or other travel documents issued by the country to which they owe allegiance.

ORDER:

IT IS ORDERED that all three applicants be excluded from the United States.

AARON I. MALTIN
Aaron I. Maltin
Special Inquiry Officer

AIM:jy

Decision of Board of Immigration Appeals, Dated April 12, 1954, Remanding for Further Proceedings

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Apr 12 1954

DECISION

File: 0300-423253
0300-423254
0300-423255—New York

In re: LEE KUM HOY,
LEE KUM CHERK, and
LEE MOON WAH.

IN EXCLUSION PROCEEDINGS

IN BEHALF OF APPELLANTS: Benny Gim, Esq.
551 Fifth Avenue
New York, New York.

EXCLUDED: Act of 1924—No immigration visas;
Executive Order 8766—No passports.

APPLICATION: Admission as United States citizen under Section 1993 Revised Statutes (Lee Kum Hoy).

Admission as United States citizens under Section 201(b) and (g) of the Nationality Act of 1940 (Lee Kum Cherk and Lee Moon Wah).

DETENTION STATUS: Detained at Government expense.

This case is again before us on appeal from an order of the special inquiry officer of December 9, 1953 excluding

respondents from the United States as persons who have not sustained the burden of proving the claimed relationship to the alleged United States citizen father.

There is before us at the present time the case of *Matter of Wing Ott Dong and Han*, 0300-419637 and 0300-420204, involving somewhat the same problems as the instant case. Dr. Alexander Wiener, whose dissertation on blood grouping and typing appears as Exhibit 2 in this case, was called as an expert witness by the Government in *Matter of Wing Ott Dong and Han*, supra, at the order of the United States District Court, Southern District of New York. 116 F. Supp. 745 (1953), order unrep. dated January 6, 1954. Dr. Wiener testified at length on the subject of blood grouping and typing. It is our belief that, in order to obtain a complete record, his testimony in that case should be incorporated into the record in the instant proceeding. The matter to be so incorporated consists of pages 42-88, testimony given by Dr. Wiener at a reopened hearing at Ellis Island, New York Harbor, on January 26, 1954.

In the interests of insuring a fair hearing, counsel in the present matter should be given an opportunity to cross-examine Dr. Wiener with regard to the testimony to be incorporated into this record, if counsel requests the privilege of such cross-examination. The record should not be reopened generally.

ORDER: It is ordered that the record be reopened for the purposes specified in the foregoing opinion.

THOS. G. FINUCANE
Chairman

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal.

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Jun 17 1954

Files: 0300-423253—New York
0300-423254
0300-423255

In re: LEE KUM HOY,
LEE KUM CHERK, and
LEE MOON WAH

IN EXCLUSION PROCEEDINGS

IN BEHALF OF APPELLANTS: Benny Gim, Esquire
551 Fifth Avenue
New York, New York

and

IN BEHALF OF SERVICE: Sidney B. Rawitz,
Service Representative
(Heard: January 13, 1954)

EXCLUDED: Act of 1924—No immigration visas
Executive Order 8766—No passports

APPLICATION: Admission as United States citizen under Section 1993 Revised Statutes (Lee Kum Hoy).

Admission as United States citizens under Section 201(h) and (g) of the Nationality Act of 1940 (Lee Kum Cherk and Lee Moon Wah).

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

DETENTION STATUS: Detained at government expense

When this case was last here, we also had before us for reconsideration *Matter of Wing Ott Dong and Han*, 0300-419637 and 0300-420204, Int. Dec. 472 (two parts) involving much the same problems and which also came back for rehearing at the order of the United States District Court for the Southern District of New York. We reopened this case on April 12, 1954 in order that the testimony of Dr. Alexander S. Wiener in the Wing Ott Dong case could be incorporated by reference in this record. It was our belief that Dr. Wiener's testimony was comprehensive and provided the answers to many questions that have arisen in this case and other similar cases, and that in the interest of providing a clear and complete record that testimony should be incorporated in this record. We ordered that counsel for appellants should be given an opportunity to cross-examine Dr. Wiener, if he so requested.

One of the grounds of appeal to the court was the Service's failure to produce Dr. Wiener as a witness. Now counsel moves this Board to reconsider and withdraw the order of April 12, 1954 on the grounds (1) that Dr. Wiener's testimony was given in a different proceeding involving different appellants and different problems, and (2) that the inclusion of that testimony at this time would be unfair and prejudicial to appellants in this case, due to the costs of rehearing and reargument. That order was designed to provide appellants with every possible protection and to assure a complete hearing. The courts have discussed the propriety of the Immigra-

tion and Naturalization Service using Dr. Wiener's dissertation (referred to later herein) in interpretation of blood tests. In the Wing Ott Dong case the court ordered that Dr. Wiener or some similar expert be called by the government.

Without passing on the merits of counsel's contentions, and since he does not wish to avail himself of the opportunity to cross-examine Dr. Wiener, we will now withdraw our order of April 12, 1954 and consider the case on the record as it now stands.

Appellants are two boys and a girl, aged 21, 13 and 12 years. They arrived by plane from Hong Kong, China on June 17, 1952. They claim to be brothers and sister, the children of Lee Ha, and his wife, Wong Tee Hee, to whom the alleged father was married in China in 1923. They claim United States citizenship by virtue of the citizenship of the alleged father under Section 1993, R. S. and 201(h) and (g) of the Nationality Act of 1940. They were excluded by a board of special inquiry at New York on September 18, 1952, the board having found that the claimed relationship was not sustained by the evidence of record, that the appellants are therefore alien immigrants and inadmissible on documentary grounds. Appellants took an appeal to this Board, and on May 11, 1953 we dismissed that appeal.

Appellants petitioned for a writ of habeas corpus. The United States District Court for the Southern District of New York held that such a writ would issue unless the hearing were reopened before the board of special

inquiry for purposes specified by the court. *U. S. ex rel. Lee Kum Hoy* v. *Shaughnessy*, 115 F. Supp. 302 (S. D. N. Y. September 17, 1953). In accordance with the order of the court, the hearing was reopened before a board of special inquiry on November 5, 1953 and was continued on November 30, 1953 before a special inquiry officer who was substituted for the board with the consent of all parties. The special inquiry officer after hearing the evidence reaffirmed the earlier findings and again excluded the appellants on the ground that they have not sustained the burden of establishing that they are entitled to admission to the United States as the children of a United States citizen. The case again came before us on appeal from that decision.

The United States citizenship of the alleged father has been conceded by the Immigration and Naturalization Service. The alleged mother was admitted to the United States on January 16, 1949 and is a legal resident, now living with the alleged father. The alleged father acted as witness in 1939 for Lee Kim Ark (Seattle file 2500/12921), an alleged twin brother of appellant Lee Kum Hoy. The board of special inquiry originally found after extensive interrogation of the alleged father, the alleged mother and each of the appellants, and the special inquiry officer at the reopened hearing found that the testimony of all of them was "reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service." The findings of non-citizenship and the exclusion orders were based upon the appellants' lack of positive proof of the claimed relationship and upon the results of blood-grouping tests.

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

Two complete series of blood-grouping tests were made on blood specimens of each of the appellants and on the alleged father and mother at the United States Public Health Service Hospital at Staten Island, New York. The results of these tests were interpreted by the board of special inquiry in accordance with tables set forth in Exhibit 2 of this record, an article entitled "Blood Grouping Tests in the New York Courts" by Alexander S. Wiener, M. D.[1] The board of special inquiry, the special inquiry officer and this Board found that the blood tests demonstrate that it is impossible that two of the

[1] Frequently in the course of these cases the tables have been referred to by the courts and others as "Dr. Wiener's Tables". Perhaps this has been misleading, because of course these same tables appear in all literature on the subject of blood testing. Dr. Wiener's pamphlet containing the tables which was used as an exhibit in these cases by the Immigration Service was used, we assume, rather than some other exposition on the subject, simply because it happened to be available in convenient reprint form, and because of the prominence of the author, a pioneer in this field. The same tables are set forth in 163 A. L. R., 923, in *State* v. *Damm*, 62 S. D. 123, 251 N. W. 7, Exhibit 21 of this record—"Medicolegal Application of Blood Grouping Tests," by Davidsohn, Levine, and Wiener, pub. in Journal of American Medical Association, June 14, 1952, Vol. 149, pp. 699-706 and for historical background of these tests see this Board's opinion in *Matter of L. F. F.*, Int. Dec. 430, now part of this record.

three appellants, Lee Kum Hoy and Lee Moon Wah, could be the children of the alleged parents.[2]

The first A-B-O tests resulted in findings that the alleged parents both had A blood.* Lee Kum Hoy and Lee Moon Wah were found to have B blood.*. Lee Kum Cherk was found to have O blood: Referring to the accepted tables of the inheritance of blood properties, it was discovered that, if the tests were accurate, Hoy and Wah could not be the children of the claiming parents. Two parents with A blood cannot produce a child with B blood. A recheck of the test results was requested by the Immigration and Naturalization Service, since there was a showing of incompatibility of blood. A second series of A-B-O tests was performed, *and the results were the same.* They

---

2

Parents' blood groups	Groups of children not possible
*A and A	B, or AB*
A and B	None (i. e., all groups possible)
A and AB	O
A and O	B, or AB
B and B	A, or AB
B and O	A, or AB
AB and B	O
AB and AB	O
AB and O	AB, or O
O and O	A, B, or AB

Blood type of parents	Types of children not possible
*M and M	N, or MN*
M and N	M, or N
M and MN	N
N and N	M, or MN
N and MN	M
*MN and MN	None (all types* possible)

establish the impossibility of the claimed family relationship between the alleged parents and Hoy and Wah.

Because the A-B-O tests showed that Hoy and Wah could not be the children of the claiming parents, we also excluded Cherk, on the ground that the unreliability of the other four members of the alleged family had been demonstrated. Without their testimony, which we could no longer accept, his relationship to the alleged father was not established.

The tests here in dispute are the M-N tests performed at the same time as the A-B-O tests. The first M-N test, performed in July, 1952, purported to show that the alleged parents both had M blood, that Hoy and Wah had M-N blood and that Cherk had N blood. If these tests were accurate, none of the appellants could be the children of the claiming parents. A second series of M-N tests was performed, in August 1952, and the results were different as to both the parents and as to Hoy and Wah. According to the second tests the parents both had M-N blood, Hoy had M blood, Wah had M-N blood and Cherk had N blood. When both parents have M-N blood, the M-N test is valueless because it is possible for their children to have any of the three types of the M-N System. (See Footnote 2.) On reargument before this Board counsel for the Immigration and Naturalization Service stated that the Service has abandoned reliance on all the M-N tests in the present proceeding, because they were inconclusive, and because the results of the M-N tests are not necessary to support the conclusion of excludability. Counsel for appellants contends that the Service cannot abandon the M-N test results without abandoning all of its blood test evidence.

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

When appellants were before the United States District Court on their application for a writ of habeas corpus, the court declared, citing *U. S. ex rel. Chu Leung* v. *Shaughnessy*, 2 Cir., 176 F. 2d 249, that the excluded alien was limited in habeas corpus to a review of the fairness of the hearing and the correctness of the rules of law applied. The court held that in the present proceeding appellants did not receive a fair hearing in that they were denied due process of law at the hearings in July and August of 1952 for the following reasons:

1. The appellants were not given the opportunity to cross-examine the United States Public Health Service technicians who conducted the blood tests at the request of the Immigration and Naturalization Service.
   a. The reports did not show clearly who performed the tests.
   b. The appellants were not enabled to test the qualifications of the testors or to inform themselves as to the techniques and procedures used in performing the tests.
2. The appellants were not given the opportunity adequately to inform themselves as to the meanings of the symbols on the blood-test reports which were placed in evidence. The court was not satisfied with the absence of explanations as to why the two sets of M-N tests had dissimilar results.
3. The Immigration and Naturalization Service imposed a condition that independent blood tests made by technicians of the appellants' own choice must

be made "under the supervision of the United States Public Health Service". This was considered by the court to be a denial of due process for the reason that such supervision might "result in tests which would perpetuate the errors, if any, made by the Service in its own tests".

The court rejected appellants' request to find that it was error to introduce the blood-test tables without producing Dr. Wiener for examination as to the accuracy and universality of those tables. The court observed that blood-test evidence has been accepted as conclusive in *Comm. of Welfare of City of N. Y. ex rel. Tyler* v. *Costonie*, 277 App. Div. 90, 97 N. Y. S. 2d 804 (1950) and in *Jordan* v. *Mace*, 144 Me. 351, 69 A. 2d 670.[3]

It is the belief of this Board that *the errors in and omissions from the record indicated by the court have been*

---

[3] The outstanding line of cases is from the New York Courts: *Dellaria* v. *Dellaria* (1944), 183 Misc. 832, 52 N. Y. S. 2d 607; *Schulze* v. *Schulze*, 35 N. Y. S. 2d 282 (1942); *D'Agostino* v. *D'Agostino*, 173 Misc. 312, 17 N. Y. S. 2d 905 (1940); *Cuneo* v. *Cuneo*, 96 N. Y. S. 2d 899, 198 Misc. R. 240 (1950); *Scalone* v. *Scalone*, 98 N. Y. S. 2d 167, 199 Misc. Rep. 210 (1950); *Saks* v. *Saks*, 189 Misc. 667, 71 N. Y. S. 2d 797 (1947); *Clark* v. *Rysedorph*, 118 N. Y. S. 2d 103 (Sup. Ct. App. Div. 1952).

Other cases in which the courts have recognized the cumulative demonstrations of the reliability of blood tests as negative proof, and have either ordered blood tests or ordered new trials where juries had rejected blood test evidence: *Com.* v. *Zamerelli*, 17 Pa. D. & C. 229 (1931); *State* v. *Wright*, 59 Ohio App. 101, 17 N. E. 2d 428 (1938); *State ex rel. Van Camp* v. *Welling*, 22 Ohio L. Abs. 448, 6 Ohio Ops. 371, 3 Ohio Supp. 333 (1936). In a recent case, *Groulx* v. *Groulx*, 103 A. 2d 188 (N. H. Sup. Ct., March 2, 1954), the court recognized as persuasive blood test evidence based on the new Ss-system tests. Non-paternity had not been demonstrated by the A-B-O, M-N, or Rh tests, but the blood grouping laboratory conducting the tests certified that non-paternity was demonstrated by their Ss-tests.

cured by the reopened hearing, to the extent that it is possible, in view of the refusal of appellants' counsel to permit appellants to submit to additional blood tests conducted by any authority.

In accordance with the court's instruction set forth under (1) above, the Immigration and Naturalization Service called Frank Monica, transfusionist and technician employed by the United States Public Health Service. He testified that he had conducted all the tests which were not conducted by Douglas Bush, a technician who conducted a few of these tests, but who is no longer employed by the Public Health Service. He stated that he has been employed at the United States Public Health Service Hospital at Staten Island for eight years, that as part of his regular work, which is obtaining blood from donors and giving transfusions, he examines blood for the purpose of determining grouping, typing and Rh factors. He testified that he has been doing blood grouping (that is, the A-B-O tests) for about six years, that he has been doing Rh typing for approximately the same length of time, and that he has been conducting M-N type tests only during the past year or so. The record establishes that to commit error as to grouping and typing in transfusion work would be very dangerous. He estimated that the tests he had done would probably number in the thousands. He refreshed his memory by looking at the exhibit cards, (which were in evidence showing appellants' groups, types and Rh factors) the notations he had made on them at the time of the tests, identified his initials on those cards, and testified that he is unable to identify the appellants by looking at them, but that their alleged parents appear to be familiar to him.

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

Frank Monica testified at length as to the manner in which the tests were conducted, and his testimony in this regard was similar to the testimony of Dr. Sussman (whom appellants offered as an expert in hematology) with regard to practices in his own laboratory. He testified that his immediate supervisor was a Mr. Valentine Connolly and that Dr. Camerón, who later appeared as a witness in this proceeding, was the chief in charge of the entire section. Mr. Connolly did not appear as a witness. Mr. Monica testified that he is not a licensed physician, that he has in the past and is now taking courses in medical technology at several colleges, that he does not yet hold a college degree.

With regard to questions raised by the court, Frank Monica testified that he had entered the results of the M-N tests on the same line as the Rh tests, that it was later brought to his attention that the results of the M-N tests should not be entered on the same line as the results of the Rh tests, because some confusion might result from this practice. He testified that consequently he changed his practice with regard to entering test results on cards. He testified that his notations with regard to the M-N tests had nothing to do with the Rh tests, that the plus and minus symbols he entered on the cards referred only to the Rh tests. The numbers on the cards designated the control or lot number of the serum[4] with which he was working at the time.

[4] The "serum" referred to is shown by the testimony to contain the "antibodies" to which the blood sample is subjected to induce clumping. The clumps are studied to determine the blood groups.

Decision of Board of Immigration Appeals; Dated June 17, 1954, Dismissing Appeal

Frank Monica testified (p. 55) that at the time of the July tests they were having some difficulty with their M-N serums, due to the extreme heat, that this difficulty was soon corrected, and therefore he believed that the August tests, made with a corrected N serum, were accurate ones. All testimony is that the M-N tests are more difficult to make, and that the serum is less stable. Frank Monica testified that he conducts tests to establish the positive and negative Rh factors,[5] but that he does not test for numerous sub-groups in the Rh categories. Since the exclusion in the present case was not originally predicated on Rh testing and is not now predicated upon M-N testing, it is our belief that questions as to the Rh and M-N tests conducted are not now in issue.

The special inquiry officer informed counsel at the reopened hearing that while Douglas Bush was not present, he would entertain a request by counsel that Bush be subpoenaed, in the event that he did not appear voluntarily. At the close of the reopened hearing counsel waived the appearance of Bush.

Dr. George F. Cameron, Jr., Medical Director, United States Public Health Service, Chief, Department of Pathology testified that he considered that as a result of a memorandum of May 8, 1952 from the Federal Security Agency to all Medical Officers in Charge of United States

---

[5] "If blood containing the Rh factor is transfused into a person not having the Rh factor, that person produces antibodies against the Rh factor. A second transfusion at a later date may be dangerous, or even fatal, since the immune antibodies will agglutinate Rh cells as fast as they are introduced into the circulation. It is necessary, therefore, to give only Rh negative blood to an Rh negative person". (Colliers Ency., 1950 Ed. Rh Factor. Vol. 17, p. 4)

Public Health Service Hospitals, Exhibit 23 in the record, he was not only authorized but "directed" to permit blood tests to be conducted in the laboratory under his direction.

Dr. Cameron testified also in *Matter of Dong Wing Ott and Dong Wing Han*, (our numbers 0300-419637 and 0300-420204, Int. Dec. 472, two parts) recently before the United States District Court for the Southern District of New York, as *Dong Wing Ott, et al* v. *Shaughnessy*, 116 F. Supp. 745 (S. D. N. Y., 1953). Dr. Cameron's testimony in that case is not part of the record in the present case, but because it is testimony of record and was recently before the same court we will refer to it in connection with Dr. Cameron's testimony in the present case. He testified in greater detail in the *Dong Wing Ott* case than he did in the present matter.

Dr. Cameron testified (pp. 64-65) that he has written to the Medical Officer in charge of the Division of Hospitals objecting to being required to do these tests. He stated that he is equipped to do blood tests for clinical purposes and to do tests "of diagnostic importance to the patient" but he stated, "We don't have what I consider a special room, a special technician, a special system for doing these tests which would obviate all legal doubt that the thing is valid. We have one technician doing that and other tests at the same time." He stated that the transfusionist who made these tests was giving most of his time to working in the blood bank, "typing and cross-typing of hospital patients for transfusion purposes and getting blood from donors." He made it clear that he did not want to conduct blood test examinations, that he did not consider it part of the duties of his staff, that

he did not want to testify in immigration hearings and that he resented being required to do so. The memorandum, Exhibit 23, explains in part Dr. Cameron's reluctance to testify, and no doubt his attitude reflects that expressed in the memorandum.

The court in *Dong Wing Ott* v. *Shaughnessy*, supra, discussed in part Dr. Cameron's testimony as follows (pp. 747-748):

> Over counsel's objection, a letter from Dr. Cameron, addressed to the Board, dated January 7, 1953, was then offered in evidence. This letter stated that the laboratory under his direction at the United States Public Health Service Hospital in Staten Island had in the past and continued to examine blood from individuals referred to it by the Immigration Service for the purpose of establishing such individuals' blood group in the A-B-O System, the M-N System and the Rh System; that the laboratory was competent to perform the mechanics of these examinations; that he personally did not feel that he had the background in blood grouping genetics to qualify as an expert in the medicolegal applications of blood grouping tests; that he recommended Dr. Alexander S. Wiener as an outstanding authority and that Dr. Wiener's article "Blood Grouping Tests in the New York Courts" appearing in the publication, "United States Law Review," December 1936, was considered a currently accurate source of authoritative information on the subject.

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

> . . . . The method of taking and recording the tests was explained by Dr. Cameron. According to him, theoretically it was possible to mislabel a specimen, or improperly to apply reagents to it. He admitted that there were errors inherent in the test itself and in its interpretation, and that on one or two occasions the second test had different results from the first.
>
> . . . . Dr. Cameron reiterated that he did not consider himself sufficiently expert to testify on the entire subject of blood grouping tests; that Dr. Wiener was an outstanding authority and that blood grouping tests were controversial.

Dr. Cameron was not asked whether or not he considered that Frank Monica, transfusionist, is competent to make the tests. Dr. Cameron stated that an A-B-O test is not a test that has to be conducted by a doctor, that a technician who has handled this work for a number of years can make those determinations without great difficulty, and that his laboratory is equipped to conduct A-B-O tests for transfusion purposes.

Appellants called Dr. Leon Sussman as an expert witness. Dr. Sussman operates a private blood laboratory. He testified that he is a member of a panel selected by the "Medical Society"[6], that when the Immigration and

[6] The judges of the Court of Special Sessions, after consultation with the New York Academy of Medicine, approved a panel of six doctors to conduct blood tests in paternity proceedings before the court. The New York Office of the Immigration and Naturalization Service at first attempted to permit the applicant to choose his own doctor, since he was paying the fee. Finding that some doctors were not qualified and that the questions of fraud and overcharging arose, the procedure outlined by Dr. Sussman was agreed upon.

Naturalization Service desires a blood test conducted the applicant is now presented with the panel of qualified experts, that the applicant selects one name from that panel, and that doctor conducts the blood test. Dr. Sussman was asked whether or not he knows Dr. Wiener. He replied that he does and that Dr. Wiener is a qualified serologist.

Dr. Sussman testified that he has handed up many reports excluding paternity in cases in the Court of Special Sessions in New York. He stated that only two conclusions are possible as the result of a blood test: First, that an exclusion of paternity is reported or second, no opinion can be given with regard to paternity. Neither Mr. Schatkin,[7] of counsel for appellants, nor Dr. Sussman questioned the validity of properly conducted blood tests. On the contrary, proceedings were conducted on the assumption that blood tests can disprove paternity when there is dissimilarity of blood types.

Dr. Sussman testified that in his own laboratory he employed four technicians who carry out the processes of blood testing under his supervision. He was asked whether he supervised the technicians working in his laboratory to the extent of watching what they did when they were running tests. He answered (p. 38), "Not every moment of the time, no sir". He stated that in his laboratory duplicate tests are run by a different technician and if inconsistencies are uncovered a third test is repeated by a third technician, each one working inde-

[7] S. B. Schatkin, whose work, Disputed Paternity Proceedings, particularly Chapter VIII, "The Unerring Accuracy of Blood Tests," is often quoted in opinions and literature dealing with blood testing. See *Matter of L. F. F.*, Int. Dec. 430.

pendently. It is then necessary to discover why the original inconsistencies occurred. Dr. Sussman refused to draw any conclusions from the tests made in Public Health Service laboratories, because he considered them inconclusive tests. He testified that he had "a feeling that there are inaccuracies" (p. 36). *He did not offer blood test evidence to prove that appellants have other than the blood groups shown by the Public Health Service tests.*

Dr. Sussman testified *that if the A-B-O tests involved here had been conducted in his laboratory, and if he therefore were assured that they were accurate, he would necessarily have to conclude that two of the appellants, Lee Kum Hoy and Lee Moon Wah, are not the children of the alleged parents.* He stated (p. 36), "I am questioning the validity or accuracy of this report and on the basis of such I cannot exclude paternity".

In *Matter of Dong Wing Ott et al.*, supra, Dr. Wiener testified that he does not testify to the accuracy of tests conducted by laboratories other than his own. As we pointed out in that case, Dr. Wiener stated, "Naturally, if you testify you want to say you did everything with your own hands, you saw everything." This seems to us to be a not inappropriate professional precaution. Dr. Sussman was not asked during the reopened hearing whether or not he had at any time tested the appellants in this case.

Dr. Sussman testified that in his laboratory usually they fingerprint the applicant or take his signature and automobile license, or other proof of identity. He further testified, however (p. 35), that immigration applicants are not fingerprinted, that they are identified by a person from the Immigration Service who accompanies them and by a letter which they present from the Service. There

was testimony in the *Dong Wing Ott* case that the applicants who came to the United States Public Health Service laboratory at Staten Island were always accompanied by a staff member from the Immigration and Naturalization Service for purposes of identification.

Dr. Sussman testified that the A-B serums turned out by established commercial concerns in the United States are well established for accuracy, that his laboratory makes its own serums for M-N and Rh tests, but that he buys commercial serums for A-B-O tests, that all brands are equally satisfactory, because they are all under the control of the National Institutes of Health and have to satisfy certain requirements The United States Public Health Service laboratories also use commercially prepared serums, and it may be assumed that Dr. Sussman's testimony as to the accuracy of the A-B serums applies equally to those bought and used by them.

During the first and second hearings and in his first two appearances before this Board, counsel requested that Dr. Wiener be called for cross-examination with regard to the blood testing tables which appear in his article. As the court said, "Counsel for appellants could have called Dr. Wiener", but they did not do so. Instead, Dr. Sussman was called by counsel for appellants, and he testified as to laboratory techniques. He was not asked by either counsel as to the validity and application of the blood testing tables, and as to whether such data is equally applicable to Caucasians and persons from Asiatic countries.

At the time of the first hearing before the board of special inquiry on August 14, 1952 appellants were given an op-

portunity to have a third set of tests made. On page 14 of the record the chairman of the board of special inquiry said, "At this time motion is in order to defer decision in this case in order to give counsel an opportunity to make an independent blood test by a doctor retained in behalf of the applicants under the supervision of the United States Public Health Service with prior notice to the Immigration Service." A motion was made and seconded by the members of the board that such a test should be made within ten working days. When the hearing was reopened on September 18, 1952 counsel stated, "I should like to withdraw my request previously made for an independent blood test and wish to reiterate my request to cross-examine Dr. Wiener relative to the treatise or pamphlet which was offered in evidence as Exhibit 2. The chairman of the board of special inquiry said to counsel, "Is there any reason why you have withdrawn your request to submit evidence of blood tests?" Counsel replied (p. 16), "After studying the situation with due deliberation I came to the conclusion that I should first cross-examine Dr. Wiener before offering any independent proof." Counsel did not complain at that time of the suggestion that a Public Health Service representative "supervise" the independent tests. As previously observed, counsel recently declined the opportunity to cross-examine Dr. Wiener.

The court observed with regard to the blood testing procedure (p. 308), "The net effect of this is that the Immigration officials can arrange for blood tests and have at their disposal any information they desire concerning the tests." The Immigration and Naturalization Service commenced to use the panel referred to by Dr. Sussman

between the time of the original hearing in this case and the reopened hearing, in an effort to eliminate the kind of criticism made by the court. While an independent testing laboratory gives applicants blood testing results which are perhaps more psychologically satisfactory to them, and which are more satisfactory to us as evidence, the fee paid by the applicant is substantially greater than the nominal charge (of two dollars, p. 63) made by the Public Health Service when it makes the tests. However, counsel for appellants has refused to utilize the services of any member of the panel for blood testing purposes.

The court felt that appellants were denied due process because of the condition imposed by the board of special inquiry that the tests be made "under the supervision of the United States Public Health Service." The court suggested that such supervision might result in tests which would perpetuate the errors, if any, made by the Public Health Service in its own tests. When this case was last before us we concluded that private tests by competent technicians should be made under "supervision", but we did not state that this meant the supervision of the United States Public Health Service. We stated "existing statutes[8] covering blood grouping proof unanimously provide for adequate judicial control. Tests should be inadmissible unless they are made under approved conditions."

It was our belief at the time that it was not for us to prescribe those conditions, but that the mechanics for making independent tests with mutually approved experts could be worked out between counsel for the appellants and the Immigration Service. The stipulation that there be some

[8] Existing State Statutes up to 1943 are set forth in the appendix to our decision in *Matter of L. F. F.*, Int. Dec. 430.

kind of supervision of the independent blood tests was a reasonable one, in order to prevent fraud and error, not necessarily in this case but in the many similar cases that have arisen and will, no doubt, arise in the future.

At the reopened hearing, in an effort to comply with the order of the court, the special inquiry officer asked counsel for appellants (p. 41):

> Before proceeding further, in view of the fact that you have presented an expert and you have indicated in other ways that you cast a doubt upon the validity of the tests which are now Exhibit 1, would you be willing to submit the three applicants and the parents to a new series of blood tests, say by Dr. Sussman who was just here?

Counsel asked if he was being "ordered or directed" to submit appellants to a third set of tests. The special inquiry officer responded that it was not an order or direction, but that he hoped merely to satisfy himself and counsel and all the other persons involved, and if there had been errors in the tests this was the way to eliminate them. Counsel stated (p. 42):

> *. . . . At the present time I wish to decline to submit the applicants and their parents to a blood test.*

Since appellants again were given an opportunity at the reopened hearing to submit to a third set of blood tests by technicians of their own choice and declined to do so, we believe that the Immigration and Naturalization Service complied to the best of its ability with that portion of the order of the court concerned with retesting.

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

The court asked certain questions with regard to the record and evidence which we will endeavor to answer on the basis of the record as it now stands. First, the court asked if there is a close similarity between the M-N and N types which would account for the transposition of those symbols in the first and second tests of three out of five of those tested. The discrepancies between the results of the first and second M-N tests probably were caused by inadequate or defective N serum used in the July tests and corrected in the August tests.

Second, the court asked if there is a like similarity between the B, O or A types which would make such mistakes likely in the A-B-O test. It is unlikely that such a mistake would occur in recording an A-B-O test, because of the greater "distance" between the groups, and the stability of the serums. Dr. Wiener testified in the reopened hearing in the *Dong Wing Ott* case that any hospital blood bank technician can do an A-B-O test, that there are hundreds of people competent to do such tests, that A-B-O clumping can be seen with the naked eye, that Dr. Cameron is, and any technician trained by him would be, competent to do such a test.

Third, the court asked if the omission of the plus sign from the Rh line in two instances is significant, or if that was an inadvertence, and if there is any significance in the entering of the M-N symbols on the Rh line sometimes, or if that was also an inadvertence. The M-N symbols were occasionally placed on the Rh line by inadvertence. Later this was corrected and the notations with regard to the M-N tests and the Rh tests were placed on separate lines (p. 46).

Fourth, the court asked what, if any, is the significance of the change in terminology from "Blood Type" and "Rh Factor" to "Blood Group" and "Rh Type". The record establishes that for purposes of distinction the word "Group" refers to the A-B-O classification, and the designation "Type" is used to describe the M-N classification. With regard to the Rh test, apparently the terms "Factor" and "Type" are used interchangeably. While all discussions of the tests recognize that there are three separate and distinct types of tests now in general use[9] to which the blood may be subjected, each relating to a separate blood system, the terms "Group," "Type," and "Factor" are used carelessly both in writing and speaking.

Fifth, the court asked, "Is there any reason to believe that a third set of tests would not result in a still different conclusion." We have no way of being sure what a third set of M-N and Rh tests would show, since the appellants have refused to permit new tests. However, it is not necessary to have M-N and Rh tests, when nonpaternity is discoverable by the A-B-O test alone. Both sets of A-B-O tests establish that two of the applicants could not be the children of the claiming parents. It is unlikely that a third set of A-B-O tests would show different results from the two sets already made.

The court refers to the common-law presumption of legitimacy as one of the strongest presumptions known to the law. There is no problem here of legitimacy, of bastardizing a legitimate child. Our problem is strictly one of *identity*. This is not the usual filiation or statutory rape

[9] Other independent blood systems have been discovered, for example, the S-s factors, the Lewis system, the K-k types.

proceeding, nor is the Immigration Service an adversary, in the usual sense. Its duty is only to attempt to discern the truth of the claim to citizenship.

What inference may be drawn from appellants' refusal to submit to blood tests by their own doctor?

In *Wong You Henn* v. *Brownell*, 207 F. 2d 227 (D. C. Cir., 1953) the plaintiff urged as error an unfavorable inference drawn by the trial judge from plaintiff's failure to take certain depositions in Hong Kong. The trial judge had suggested the value of such depositions from persons who had custody of plaintiff from an early age. The plaintiff declined to take such depositions, although the trial court offered a suitable continuance for that purpose. The appellate court held that *the unfavorable inference* drawn by the trial judge *was unavoidable and proper.*

The basic rule with regard to the nonproduction of evidence is stated in Wigmore, Vol. 2, Par. 285, as follows:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstances or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the pro-

priety of such an inference in general is not doubted.

> *The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause.* Ever since the case of the Chimney-sweeper's Jewel, this has been a recognized principle. 1722, *Armory* v. *Delamirie,* 1 Strange 505. (Emphasis supplied.)

Wigmore then reviews a great number of cases expounding this principle, both English and American, from 1705 to the present day. A typical case is *Wesson* v. *U. S.,* 175 F. 2d 931 (C.A. 8, 1949), in which the court said:

> The failure of the government, under the circumstances disclosed, to call these witnesses justified, if it does not compel, the inference that their testimony would have been against the government (citing cases).

Again in *Neidhoefer* v. *Automobile Insurance Co. of Hartford, Conn.,* 182 F. 2d 269 (C.A. 7, 1950), the presumption was stated:

> Notwithstanding the importance of these parties as witnesses, the record discloses no reason why their testimony was not produced in person or, if that was not feasible, by deposistion. The rule is well established, and we think it is of significance in the instant situation, that *the failure to produce evidence, which under the circumstances would be expected, gives rise to a presumption against the party failing to produce it.* (Emphasis supplied.)

This rule is perhaps most widely applied against the bankrupt in bankruptcy proceedings, vast numbers of cases holding that he is in the best position to tell what happened to missing assets, and if he fails properly to inform the court, unfavorable inferences may be drawn. The United States Supreme Court recognized the presumption in *United States* v. *Di Re,* 332 U. S. 581, 68 Sup. 222, 92 L. ed. 210 (1947) and in *Maggio* v. *Zeitz,* 333 U. S. 56, 92 L. ed. 476 (1948).

Since it was exclusively within the power of appellants to offer additional blood test evidence, the best possible refutation of the Government's blood test evidence, and since they have refused to do so, *it seems reasonable to draw the inference that they know or fear that such evidence would be unfavorable to them.*[10]

Counsel for appellants bases his appeal to this Board from the order of exclusion of the special inquiry officer on three grounds:

1. The blood tests are inaccurate and upon scientific testimony have been demonstrated to be invalid for the purposes of any determination as to nonpaternity.

---

[10] When this matter was before the United States District Court, the Immigration and Naturalization Service might have requested the court to make an order requiring appellants to submit to comprehensive blood grouping and typing tests performed by physicians appointed by the court or mutually agreeable to the parties. Rule 35 of the Rules of Civil Procedure, 28 USCA now authorizes such tests, according to *Beach* v. *Beach*, 114 F. 2d 479 (C. A. D. C., 1940), which has been widely cited as authority for Federal courts to order blood grouping tests. Recent cases to rely on this authority are *Ly Shew ex rel. Ly Moon* v. *Acheson*, No. 30159 (this order unrep. but later proceedings rep. 110 F. Supp. 50, S. D. Cal., 1953) and *Fong Sik Leung* v. *Acheson*, unrep. No. 30318.

2. The blood tests were unauthorized by law and are racially discriminatory in practice, and to have compelled the applicants to submit to blood tests was a denial of due process of law.

3. There was no competent evidence, aside from blood tests, which as pointed out are of worthless probative value, upon which the special inquiry officer based his findings.

It is our belief that counsel's grounds of appeal are frivolous in the face of his continued refusal to permit any additional blood tests. Counsel's first ground of appeal has been considered above.

The second ground of appeal is two-pronged. (a) That the blood tests are unauthorized by law and (b) that they are racially discriminatory. With regard to the contention that blood tests are unauthorized by law, it is a common practice of the Department of State to require applicants for visas to submit blood test evidence to the proper authorities before the visas are issued as part of the evidence of the claimed relationship. (See Exhibit 23.)

Directly in point is the recent case of *Wong Yoke Sing* v. *Dulles*, 116 F. Supp. 9 (E. D. N. Y., 1953) wherein the plaintiff applied for a statutory certificate of identity to enable him to travel from Hong Kong to the United States to testify in his action for a declaratory judgment under Section 503 of the Immigration and Nationality Act of 1952. His application had been denied by the American Consul, and he appealed to the Secretary of State. The Secretary of State offered to issue the certificate if the plaintiff's alleged mother would submit to

a blood test, and if the test showed a possibility of a physical relationship between the mother and the plaintiff son. The alleged mother failed to submit to the blood test and the court held that the plaintiff should be given another opportunity to obtain a blood test of the alleged mother and set the period of 90 days for that purpose, during which time the defendant administrator was instructed to render plaintiff all possible assistance. The court further ordered that at the end of this period the defendant should issue an order either denying or granting the certificate of identity and stating his reasons therefor. There was no discussion of the propriety of the request by the Secretary of State that blood test evidence be offered to support the request for the travel document. The court apparently accepted without question the value of blood testing evidence.

If indeed statutory authorization is needed for physical examinations of foreign born claimants to citizenship arriving in the United States for the first time, it is provided by Section 234 of the Immigration and Nationality Act of 1952, 8 USC 1224, formerly 8 USC 152, Section 16 of the Immigration Act of 1917, as amended,[11] the Public Health Service Act, 42 USC 252,[12] and Public Health

---

[11] 8 USC 1224: . . . Aliens (including alien crewmen) arriving at ports of the United States shall be examined by at least one such medical officer or civil surgeon under such administrative regulations as the Attorney General may prescribe, and under medical regulations prepared by the Surgeon General of the United States Public Health Service.

[12] 42 USC 252: The Surgeon General shall provide for the making, at places within the United States or in other countries, such physical and mental examinations of aliens as are required by the immigration laws, subject to administrative regulations prescribed by the Attorney General and medical regulations prescribed by the Surgeon General with the approval of the Administrator.

Service Regulations 42 CFR 34.1.[13] There are other statutes and regulations providing for medical and surgical treatment and dental care for aliens and "persons when detailed".[14] The fact that these appellants claim to be citizens and not aliens does not deprive the Service of the power and duty to give care and treatment and to conduct the necessary examinations under these laws and regulations. Until a determination has been made as to whether they are citizens or aliens, it may be administratively practical and a necessary precaution for the health and protection of all detainees that they be accorded the same treatment.

Counsel contends that the blood tests made in this case are radically discriminatory. The court specifically refused to rule on appellants' contention that requiring blood grouping tests of Chinese claimants to derivative citizenship constitutes racial discrimination by the Immigration and Naturalization Service. The court stated that the facts with regard to the alleged practice were not sufficiently before the court at that time and that they might be further developed in the future if necessary. There has been no proof offered in support of this contention.

---

[13] Public Health Service Regulations, 42 CFR 34.1: The provision of this part shall apply to (a) the medical examination and reexamination of aliens presented therefor to the Public Health Service upon the arrival of such aliens at a port of entry, or upon an application for a visa at a foreign consulate of the United States, and (b) the medical and other care, and burial, of aliens admitted to Public Health Service stations and hospitals at the request of the Immigration Service.

[14] 42 USC 249
42 CFR 34.11(a).

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

It is our belief that the issue of racial discrimination is not properly in this case. When a case involves a question of whether or not members of a minority group in the United States shall vote or go to certain schools or be employed in certain jobs, and the allegation is that they are being prevented from voting, schooling or employment because of their race, then the question of racial discrimination is an issue. This is not such a case. There is only one question here, that of *identity*—"Is this child the offspring of the claimed father?" There is no question of race involved. In disputed paternity proceedings the value of blood testing was quickly recognized because it had been so difficult to disprove a false charge of paternity. The same is true in the present case—it is more difficult to *disprove* a false claim of relationship, than it is to prove a true claim.

We cannot hold that merely because claimants are non-white it is not necessary for them to offer adequate proof to substantiate their claims of citizenship. Claimants born in countries other than China are not permitted to establish citizenship without any proof except their claims. In *U. S. ex rel. Rongetti* v. *Neelly*, 207 F. 2d 281 (C. A. 7, 1953), the court stated that where plaintiff was born in Italy and came to the United States from that country, the burden of proof to establish his United States citizenship was upon him, and that he had not sustained the burden by a bare claim of citizenship unsubstantiated by any evidence. In *U. S. ex rel Barilla* v. *Uhl*, 27 F. Supp. 746, S. D. N. Y., 1939, affd. 2 Cir., 108 F. 2d 1021, the court found that the precedents require "some substantial evidence in support of their claims of citizenship."

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

The birth certificate offered here—and it is usually true of Chinese birth certificates—is a delayed birth certificate issued in 1948. It has been held that a birth certificate not filed contemporaneously with the birth of the person named therein is not entitled to be given the weight of a birth certificate executed at the time of birth. *Ex parte Wilson*, 49 F. 2d 468 (N. D. Wash., 1930); Nagle v. Dong Ming, 29 F. 2d 438 (C. A. 9, 1928). We followed those precedents in *Matter of Wong Fon*, 7181963 (October 25, 1949), which involved a birth certificate issued by the State of California 49 years after the alleged date of the birth of the applicant.

China is still a country without reliable vital statistics maintained by organized, recognized government authority. A quick, scientifically accurate, simple and inexpensive method to assist in screening applicants should be as valuable and desirable from the standpoint of the applicants as from the standpoint of this Government. The courts as well as the immigration authorities dislike the "discrepancy in testimony" technique. The cases which have so far arisen have involved Chinese persons, because of their historic custom of leaving their children in China to be raised and educated before bringing them to the United States.[15] Most of the tests were made at the request of the American Consul in Hong Kong prior to documentation of claimants who wished to proceed to the United States. The tests were made of mothers and children in Hong Kong and fathers in the United States. The results of the tests were compared, and a determina-

[15] For a comprehensive discussion of the overall problem see: *Mar Gong* v. *McGranery*, 109 F. Supp. 821 (N. D. Calif. 1952) and *Ly Shew* v. *Acheson*, 110 F. Supp. 50 (N. D. Calif., 1953).

tion so far as possible[16] of compatibility or incompatibility made before the claimant children began their expensive trips to the United States. An early determination is of even greater value to the applicant than to the Government. With regard to counsel's third ground of appeal—that there is no competent evidence to support the Government's order of exclusion aside from the blood tests—it must again be pointed out that the burden of proof to establish their citizenship is on the appellants. *Randolfo* v. *Acheson*, 202 F. 2d 38, C. A. 2 (1953); *Ly Shew* v. *Acheson*, 110 F. Supp. 50 (N. D. Calif., 1953); *Ex parte Chun Wing*, 18 F. 2d 119 (D. C. Wash., 1927); *Ex parte Delaney*, 72 F. Supp. 312 (D. C. Calif., 1947).

They have offered no evidence of contact between themselves and their father during the years he was in the United States and they were in China. There is none of the evidence we might expect of a longstanding, normal family relationship—old family photographs or school records. The snapshots in evidence were taken at the airport as appellants left China. The alleged father claims to have remitted approximately $1,000 a year for the support of his family in China, but he could offer no bank drafts or other evidence of these contributions. He claims to have corresponded with the oldest appellant, to have "exchanged a few letters a year," but none of these letters have been placed in evidence.

Counsel states that the special inquiry officer should have "substantial evidence" to justify an exclusion order, citing *Johnson, Commissioner of Immigration* v. *Ning Wing*

[16] In the cases so far before this Board, only A-B-O tests have been performed in Hong Kong.

Fong, 17 F. 2d 11 (C. A. 1, 1927). In that case the court held that appellant had established the claimed relationship to the alleged father beyond a reasonable doubt and that the Government offered no substantial evidence to refute appellant's claim. In *Chin Ten Teung* v. *Ward*, 30 F. Supp. 670 (D. C. Mass., 1939), also cited by counsel, the court held that the relationship was established by "abundant evidence" unrefuted by the Government. These cases do not support counsel's contention that the Government must show "substantial evidence" to justify an exclusion order, in the sense that the burden is on the Government to refute a bare claim of relationship such as exists in the present case.

In two recent cases the court has declared that the burden of proof is not sufficiently discharged by a mere preponderance of the evidence, but that it should be of the degree required of petitioners for naturalization. That is, when an applicant for naturalization comes before the court he is required to show "clear and convincing proof" that he is entitled to citizenship. They feel, therefore, that a claimant to derivative citizenship should prove his identity also by clear and convincing proof, because a determination that the applicant is the child of a claiming American citizen is as much a declaration that he is a citizen as if he were naturalized in a court of the United States. *Ly Shew* v. *Acheson*, 110 F. Supp. 50 (N. D. Calif., 1953); *Wong Gum* v. *McGranery*, 111 F. Supp. 114 (N. D. Calif., 1953). It is not necessary to go so far in the present proceeding, for the reason that these applicants offer no satisfactory proof of identity but have attempted to throw on the Government the burden of disproving their claims.

Decision of Board of Immigration Appeals, Dated June 17, 1954, Dismissing Appeal

Counsel cites a decision of this Board, *Matter of Ding Jone Hom*, 1300/125711 (August 15, 1952), in which we had before us, not the results of blood grouping tests, but the refusal of the applicants to take tests. We had a number of such cases. At that time we had not yet determined to our own satisfaction the conclusive nature of satisfactorily conducted blood tests, and we found that *refusal* to take the tests could not be interpreted as conclusively showing that the claimed relationship did not exist. In the present case we did not at first have a refusal to take tests. The two sets of A-B-O tests, conducted by Public Health Service technicians, demonstrate incompatibility of blood between two of the three claimants and their alleged parents. There is no evidence controverting this fact.

We have endeavored to consider the three grounds on which the court ruled that appellants were denied due process in the original hearing, the questions the court asked with regard to the Government's blood test evidence, and counsel's three bases of appeal to this Board.

To recapitulate: The burden is on the appellants to establish their citizenship. The appellants have failed to sustain the burden of proving the necessary relationship. On the other hand, the Government has introduced persuasive proof that the claimed relationship does not exist. There were procedural errors in the original hearing which led the United States District Court to hold that appellants were denied due process of law. We believe that those errors have been cured in the reopened hearings accorded appellants by the Government in obedience to the order of the court. Appellants were granted ade-

quate opportunity to cross-examine Government witnesses and to introduce expert testimony in their own behalf. A reopening for the purpose of allowing them to cross-examine Dr. Wiener was offered appellants and was declined. Two separate A-B-O tests conducted by Government technicians produced identical results disproving the claimed family relationship with regard to two appellants. Counsel's objections are frivolous in the face of his continued refusal to permit additional blood tests conducted by technicians of their own choosing. Nonproduction of evidence within the power of one party to produce, permits the inference that its tenor is unfavorable. Since new or additional blood test evidence is in the hands of appellants, they cannot properly complain that it is not in the record. Although the blood tests do not demonstrate incompatibility of blood between Lee Kum Cherk and the alleged parents, his claim is entirely dependent upon the testimony of the other four members of the alleged family group, and they are discredited as witnesses by their own demonstrably false testimony. Therefore Lee Kum Cherk also must be excluded.

It is our conclusion that the appellants have not sustained the burden of proving the claimed relationship to the alleged father. The appeal will be dismissed.

ORDER: It is ordered that the appeal be dismissed.

THOS. G. FINUCANE
Chairman

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Ellis Island, New York Harbor 4, N. Y.

In the Matter of Exclusion

Proceedings

—against—

LEE KUM HOY

LEE KUM CHERK

LEE MOON WAH

Applicants

File Nos:	0300-423253, 254, 255
Special Inquiry Officer:	Aaron I. Maltin
Stenographer:	Sheldon Handschuh
Date:	October 28, 1954
Language:	English
Held at:	Ellis Island, N.Y.H.
Counsel:	Benjamin Gim— Firm of Hong and Gim 551 Fifth Avenue New York, N. Y.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Special Inquiry Officer: In accordance with the order of Judge Dimock of the Southern District Court dated August 31, 1954, this hearing is being reopened today to take evidence from an official of the Immigration Service with regard to matters directed in the last paragraph of that order with respect to the requirement of blood grouping tests of persons of the Chinese race and the omission to require blood grouping tests under similar circumstances in cases of persons of other races and for me to make a determination, after that evidence is made a part of this record, on the issue of discrimination. I will not address the applicants or swear them in again as I don't believe they will be witnesses here today and we now have present to testify an official of the Immigration Service with whom I intend to proceed at this time unless you have something you want to say for the record.

Counsel: Mr. Chairman, I apologize for injecting my personal matters in the hearing but I confess that I have been away for the greater part of September and greater part of October on getting married and on my honeymoon and, consequently, I haven't had sufficient time to develop the evidence that I need to present at this hearing. I have filed a motion for discovery in the Federal Court for the inspection of certain files and documents of the Immigration Service. I have also prepared in preliminary form certain interrogatories and depositions I want to take of certain witnesses. I have no objection to the Government proceeding with this witness at this point but I reserve the right to cross-examine the witness at a later date when I have received the results of the depositions and interrogatories and when the motion to

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

inspect the Government files and documents has been decided upon, and if I am granted that right to inspect then to await the results of that inspection.

Special Inquiry Officer: I think perhaps I'll proceed with the witness and at that point you can cross-examine to any extent that you choose, limited or full, and then we will discuss what the next step should be in this proceeding, whether to adjourn it for your court action or whether to complete it. At that point I will be in a better position to say whether any useful purpose would be served by a further delay and also you will indicate to me more fully the nature of the witnesses and the evidence that you are seeking to obtain by court order, which may very well be available without such an order, and perhaps this witness can enlighten us on this point also so that we will reserve consideration of that until the witness has testified and you have examined to whatever extent you please and then we will discuss it on the record.

Special Inquiry Officer to witness:

Q. Will you state your name and position? A. Lester Friedman, Attorney-Advisor, office of District Counsel, New York District, Immigration and Naturalization Service.

Q. Will you please stand and raise your right hand to be sworn. Do you swear that all the testimony you will give at this hearing will be the truth, the whole truth and nothing but the truth, so help you God? A. I do.

Q. I believe that you are aware of the contents of the

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

order made by Judge Dimock dated August 31, 1954? A. I am, and may I suggest a correction, that the August directive of the court is the decision of the court upon which an order was subsequently entered.

Special Inquiry Officer: Yes, I note that. According to the file, although I don't see the actual order itself, there is information to the effect that the order was made on October 4, 1954 in conformity with the last paragraph of his decision of August 31, 1954. In view of the fact that the judge stated in his decision that the writ will be sustained unless within 20 days from the date of the order the hearing were reopened, I presume from the fact that you are present now that this opening is timely.

Counsel: I won't concede that, Mr. Maltin. I reserve the right to raise the objection later.

Special Inquiry Officer: As I understand it, this date was arranged and found to be acceptable by you. If that is not so, I would like you to say so for the record immediately.

Counsel: I was not here at that time. I don't know what arrangements were made.

Special Inquiry Officer: The Government was ready to comply with the order of the court and I wish to have your statement on the record, Sir, whether your firm agreed to have the hearing on this date.

Counsel: My partner may have made certain

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

arrangements with regard to bail which I'm not aware of——

Special Inquiry Officer: I'm not discussing the question of bail. I'm discussing whether this hearing is being reopened within 20 days as directed by the court.

Counsel: I have nothing to indicate that my partner made arrangements for the hearing at this time. You may be right. There may have been an arrangement and this may be a timely opening but I'm reserving the right to ascertain that for myself.

Special Inquiry Officer: In order to clarify this matter in your mind further, I had a conversation with Edward Hong, your law partner, here on Ellis Island at least two weeks ago and he informed me at that time that you were not in New York City. We then mutually agreed upon October 28 as the date for the reopening of this hearing and I said I would send a letter to that effect and that letter was sent out on October 14. To make it quite clear, I was and have been ready to continue with this hearing any time immediately subsequent to the date of the order, October 4. Mr. Friedman has been in this district and has been readily available to testify at any time after October 4 so that this date was chosen by mutual agreement as being the date of this hearing and Mr. Hong suggested that it be put ahead a bit because you were not in New York City.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Counsel: I'll say for the record that if you say that Mr. Hong said that, I'll accept that as a correct statement of the facts.

Special Inquiry Officer to witness:

Q. Mr. Friedman, will you give your background in the Immigration Service in so far as the positions that you have held and the knowledge that you have acquired in a general sense of the policies and procedures of this Service in this district? A. I was first appointed as a Naturalization Examiner in 1941 and beginning approximately 1942 I was assigned to that division of the Naturalization branch of the Service which handled citizenship status matters. In 1943 I was made supervisor of several units in the Status Section, including the Citizenship Certificate Unit and was for some time the acting chief of the Status Section. In fact, I was the supervisor of that division when the law was first amended to permit persons who acquired citizenship through birth abroad to an American parent to obtain a certificate of citizenship as to their status. This was sometime about 1943 and at that time I first became acquainted with the type of case which is here involved. I then obtained extensive training and background in this type of matter and actually looked at or reviewed many thousands of files, including many hundreds involving Chinese persons. About 1946 I was assigned to the office of the District Counsel as an attorney and I am still assigned to that office with the official title of Attorney-Advisor. In connection with my latter position I have had occasion to

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

obtain first-hand knowledge of all policy-level decisions and to become intimately acquainted with the operations of the Immigration and Naturalization Service by reason of my participation in many thousands of cases which have reached the courts in litigation. Such litigation also included issues of citizenship, evidence of citizenship and included cases involving Chinese persons.

Q. Can you state approximately when or definitely when this Service began to use blood tests in any of its exclusion and deportation proceedings? A. The entire concept of the use of blood tests is of very recent origin. The whole thought of using such tests originated with the State Department rather than the Immigration and Naturalization Service. It originated largely by coincidence because of the closing of consulates throughout China which caused a concentration of applicants for United States passports claiming citizenship through birth in China to an American father to be concentrated at the consulate in Hong Kong. That consulate was deluged with thousands of applications, almost all of which were predicated upon oral claims of relationship and identity without documentary evidence of a primary or secondary nature and perhaps what is most significant is that almost all such persons were born in the remote interior of China so that it was actually impossible for the consulate to conduct even the most superficial investigation of the claimed identity of such persons. The State Department deemed that the use of blood tests would be helpful in shedding some light upon these various claims. Since the fathers of most of the applicants were residing in the

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

United States, the State Department also found it necessary to obtain the cooperation of the United States Public Health Service for the purpose of blood testing the alleged fathers. The Public Health Service was at first reluctant to participate in such tests because of its limited personnel but an exchange of correspondence resulted in the Public Health Service agreeing to take such tests. After the use of such tests for some months the success had with those tests by the State Department was made known to the Immigration and Naturalization Service and it was then decided to use the tests for immigration proceedings.

Counsel: Excuse me, Mr. Chairman—I would like to make an objection to the testimony as being hearsay.

Special Inquiry Officer: Your objection in that regard is overruled but it will be noted that you have made an objection to any hearsay evidence.

Witness: The vast preparation of cases involving the use of blood tests were of course handled by the State Department. However, some cases where blood tests were indicated involved persons who had actually arrived in the United States before the extensive use of blood tests was adopted by the State Department and in those cases the Immigration Service decided to use such blood tests at first as test cases to ascertain what measure of value such tests would have as evidence on the issue of identity. When the early cases involving such tests reached the Board of Immigration Appeals, precedent decisions were made regarding the

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

evidentiary value of blood tests, principally in the leading case of Lee Fay Fan. Since the Lee Fay Fan decision, the Immigration Service has adopted a policy of using blood test evidence in any case and in every case wherein a sharp issue of identity and paternity is or may be involved. Although the policy was commenced because of a unique problem which suddenly arose in connection with many thousands of Chinese cases, that policy was never intended to be used exclusively in Chinese cases. It was intended that such evidence be used in any and every case where such evidence was pertinent and relevant to one of the issues. It has been found largely by coincidence that the Chinese cases have fallen into the category where the use of such tests is deemed essential to a greater degree than necessary in other cases.

Special Inquiry Officer to witness:

Q. Will you state for the record the approximate date that the Immigration Service started to use blood tests of persons to establish identity? A. I think it would be impossible to fix any precise date because the use of blood tests did not originate suddenly but evolved over a period of many months, approximately between 1950 and 1951. The first cases probably originated as far back as perhaps 1949.

Q. Since blood tests have been used by this Service in its determinations, has it been used exclusively in cases relating to Chinese persons? A. No. As a matter of fact,

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

I was not aware until recently of any cases by reason of my own participation in such cases of matters involving blood tests other than Chinese cases but because of the charges that were made in this case after the intermediate decision of Judge Dimock to which you have referred at the beginning of this hearing, I caused a survey to be made of the entire Immigration and Naturalization Service to ascertain what statistical data, if any, was available as to the cases in which blood tests have been used. I have ascertained that no statistical data is maintained of cases in which blood tests are used. However, two cases have arisen in Los Angeles, in the Los Angeles district, in which blood tests were determined to be essential as evidence in which Chinese persons were not involved. In addition, through the recollection of an investigator who happened to handle the cases in New York, I was told that two cases arose in the New York district in which blood tests were required for the purpose of establishing, or giving the Government an opportunity to disprove the contrary, the identity and relationship of children. In all, I know of only 17 Chinese cases in which blood tests have been used or required and four non-Chinese cases.

Q. When you say 17 cases you refer to this as one case? A. Yes.

Q. It might involve more than one person in some instances? A. It may or it may not; since we don't have statistics, I have no definite way of ascertaining that.

Counsel to witness:

Q. Do you recall what the date of the four non-Chinese cases were, the date that they submitted to a blood test?

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

A. No, I don't know the date but they are all recent cases, within the last year or two.

Special Inquiry Officer to witness:

Q. Have you determined in so far as the New York cases are concerned the place of birth of the persons involved? A. In the New York cases the persons were British subjects and I believe born in one of the British colonies.

Q. Are blood tests being taken now of persons whose identity is questioned? A. Yes. It is the present administrative policy of the Immigration and Naturalization Service to request blood test evidence of any persons, regardless of race or nationality, who make claim to some right by reason of their relationship to an alleged father or mother and in whose cases there is doubt as to the relationship, insufficient evidence to corroborate the claim of relationship, or any other reason which makes the use of such evidence necessary as part of the investigation techniques of the Immigration and Naturalization Service.

Q. Have some of the Chinese persons tested had some sort of documentary evidence or birth certificates? A. Yes. There have been cases in which birth certificates were available in Chinese cases and in which blood test evidence has nonetheless been requested, the Service view being that a birth certificate has little evidentiary value if it is not fully certified and authenticated and if it's not made at or near the time of a person's birth, but even if it was fully valid and without any question, valid in all respects, there would still remain the problem of

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

whether the person presenting that birth certificate is presenting his own or that of another person.

Q. You mentioned that you personally knew of 17 cases of Chinese persons who had had their paternity tested through blood tests. Were any of those persons in possession of some documentary evidence of their birth? A. I cannot say that with definite certainty since I didn't review all of the records. However, there is no doubt in my mind that some would have had some evidence.

Q. Am I to understand that the policy requiring blood tests was not adopted only in those cases in which there was no documentary evidence? A. No. That was only one of many criteria for determining whether or not blood test evidence should be required. I would like to explain for the record the basis for the criteria upon which the requests for blood testing is primarily based. I think we should all understand that in the average case of a child born abroad, the American parent normally would have gone abroad for social business or similar purposes and will either be married to an American wife or marry abroad. Such person would very commonly be in close communication with an American consulate. His residence would be in what we would normally refer to as the "American colony" abroad and would be well known both to the consulate and many other American citizens residing abroad and in business and in social circles. In such cases the person would normally register his marriage, if it occurred abroad, at the consulate and would register the births of his children when born abroad at the consulate. The entire family would be well known to American officials abroad and of course would have no

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

difficulty whatever in establishing the identity of his children when he seeks to bring them to the United States and applies for an American passport in their behalf. Another common pattern of case, again not involving Chinese persons, would be similar to the one I have just mentioned but wherein the American citizen parent does not keep in touch with the consulate and neither he nor his family is known to the consulate. Even in such a case, proof of the father's citizenship would be readily available by documentary evidence. There would be documentary evidence of a lawful marriage of the parents and there would be primary or at least secondary evidence of the birth of the child such as birth certificate, baptismal certificate, school record, hospital records, medical certificates, census records, police records or similar records. In addition, and perhaps the most important feature, all such cases would be with the American consulate abroad who could readily and speedily conduct an investigation in the area in which the child is claimed to have been born and could ascertain from neighbors, friends, local government officials and other sources the true identity of the child. In such cases, a problem of identity and relationship would rarely arise and there would be no need for using blood test evidence to verify an obvious relationship. However, very seldom are any of the foregoing facts present in cases of persons born in China. Such cases are unique in pattern. In the first place, the father generally goes abroad for the purpose of marrying and is not in a position to submit any documentary evidence of his marriage other than his own oral statement. The children are invariably born in remote interior villages in

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

China where no records of birth are made. The location of the place of the childrens birth is such that it is virtually impossible for the consulate to conduct any investigation in such location to ascertain whether the alleged father ever had any children and if he had whether the child or children presented are actually his own.

Counsel: Mr. Chairman, I object here to this line of testimony on the ground that the witness has no first-hand knowledge as to the facts of which he has testified or the conditions.

Special Inquiry Officer: The objection is overruled. You may continue if you haven't finished.

Witness: The inability of the consulate to conduct an appropriate investigation is probably the principal reason why some tangible evidence of identity is sought by the Government in such cases beyond the type of evidence which might be sought in most other cases. In other words, it is the nature of the cases which determines the administrative policy as to the used of blood tests and not the race of the persons concerned. The policy is directed to obtain evidence which is deemed vital and necessary in connection with a claim and is not even remotely based upon the race or nationality of the person involved. I might add that the information I have now furnished is not based upon speculation but is based upon extensive criteria knowledge gathered from high-level discussions of policy, the experience which I have had in many hundreds

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

of cases of a similar nature and the review of thousands of immigration files in which similar problems have been raised.

Special Inquiry Officer to witness:

Q. Do you know the date when the American consulates in China were closed? A. No, I do not off hand.

Q. This procedure by the State Department of the use of blood tests which you have stated came before our use of blood tests, was it adopted after the American consulates in China were closed? A. My recollection is that it was. In other words, it was definitely adopted after the consulates in China were closed in large numbers. Whether there were isolated cases before that I can't say definitely.

Q. In your experience with children of Chinese birth claiming to be citizens through paternity, have you found many or any in which registrations of marriage or registrations of the birth of children were made with the American consulates? A. Oh, yes, quite a number. As a matter of fact, I might add that although small in percentage there are a large number of Chinese cases which I have come in actual personal contact with which do not at all fall into the usual Chinese pattern but are typical of the European type of case. I have seen any number of cases where the father was born in the United States and had a birth certificate made at the time he was born. Most of those cases are usually followed up by a marriage which takes place at the American Consulate in China and many of those cases are followed up by the recording

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

of the birth of the children at the consulate and bringing those children to the consulate for that purpose. In such cases I have not seen the remotest difficulty in bringing those children to the United States and establishing their citizenship to any greater degree than if a person was born, let's say, in England. Perhaps numerically I would say one in 500 cases in China resembles that pattern, which is more typical of the European type of case.

Q. Leaving aside the question of blood testing for the moment, have you ever seen or heard of any order, directive or policy that was directed against any group of persons on the basis of race, creed or color? A. No, I never have.

Counsel: May I ask a question here?
Special Inquiry Officer: Yes.

Counsel to witness:

Q. Have you seen every order, every directive and every policy that was issued concerning the Immigration Service? A. I would say at some time or other since I have been in the Service I would say at some time or other since I have been in the Service I would at least have seen every order.

Q. Every single one? A. Yes. I'm on the distribution list.

Q. And have you read every order, every directive, every policy? A. Yes, at one time or another I have read or scrutinized every order that has come down.

Q. And you would rely on your memory that there has

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

never been any directive, order or policy which names Chinese or directs that blood tests be taken of Chinese? A. There was no administrative policy directed to the Chinese as such but there may have been orders including Chinese with others.

Q. Have you seen any directives on blood tests at all, directives or orders or standard operations instructions? A. I have.

Q. On blood tests? A. Yes, I have.

Q. Do you recall if those operating instructions or orders or directives mentioned Chinese? A. Indirectly some did.

Q. That is, they mentioned Chinese by term? A. Yes, they used the term Chinese in a favorable manner.

Counsel: I object to that, not responsive to the question.

Special Inquiry Office: It may not be directly responsive but there is no harm in leaving it in the record.

Special Inquiry Officer to witness:

Q. There is now part of this record as Exhibit #23 a letter or memorandum of the Federal Security Agency, Public Health Service, dated May 8, 1952, Washington, D. C., which I show you and ask if you can clarify any of the information contained in that letter in so far as it relates to this Service? A. This letter was written as part of the negotiations which commenced with the State Department and the Public Health Service in which attempts

were made to obtain the assistance of the Public Health Service in blood testing persons in connection with purely State Department matters. These negotiations resulted in the Public Health Service reluctantly agreeing to perform blood tests for the persons concerned at the nominal charge of $2. The Immigration Service when commencing to use blood tests, of course followed the pattern which the State Department had started of using the Public Health Service. I understand that that practice has been abandoned and the Immigration Service prefers using private doctors who are experts in the field of not only the test itself but the medical conclusions that can be drawn from such test so that this may be done by one and the same person.

Q. Counsel has by his few questions indicated an interest in any orders, directives or policies relating to Chinese persons as distinguished from those relating to all applicants or aliens being admitted to the United States. I know of my own knowledge that there have been orders and directives and regulations with regard to specific groups of aliens such as displaced persons as distinguished from other immigrants seeking admission into the United States. I therefore ask if you have any recollection of orders and directives exclusively concerning Chinese persons as a group? A. The only policy that I'm aware of which refers to Chinese persons specifically with reference to blood tests is a policy directing us not to use blood tests in Chinese cases where the State Department has issued a passport to the applicant on the assumption that the State Department has already conducted what-

ever investigation is necessary, including a blood test, if that was deemed necessary, and it would be unnecessary to duplicate their work.

Counsel: May I ask a question?
Special Inquiry Officer: Surely.

Counsel to witness:

Q. Is that policy reduced to writing? A. I assume it is but if it has been reduced to writing I believe it would be a confidential directive which would not be available for public use.

Q. Have you seen it? A. Yes, I have seen it but I don't recall the nature of whether it was a memorandum or whether it was in the form of a general distribution directive. I do not recall off hand.

Special Inquiry Officer to witness:

Q. I, too, have seen that directive somewhere and it is my belief, although I do not wish to testify on this subject that the number of cases involving blood tests that the Immigration Service is particularly involved in, other than as an assistant to the State Department, has fallen off or has complete stopped. Is that so? A. I know of no recent case of an applicant arriving in the United States claiming a specific identity in relationship to a citizen father in which a blood test has been used in recent months.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Counsel to witness:

Q. But the State Department has conducted a blood test, is that so? A. I believe so, and the State Department has used blood tests more universally than before so there would be no need for the Immigration Service to conduct——

Q. Isn't it a fact that the Immigration Service assists the State Department in taking the parents, in requesting the parents, to take a blood test and having those parents accompanied by an immigration inspector to a doctor approved by the Service for a blood test? A. That is rarely true. In most cases the State Department would handle it directly through its own officers. However, there are cases in which the parent is before the Service. For example, if the parent is applying for a nonquota vise then the father, as an applicant before the service, might be requested to be submitted to a blood test.

Q. Has the Service taken the parent to a doctor for a blood test in those cases which you mentioned? A. I don't know what physical mechanics are employed but I know the Service has arranged for it.

Q. And an immigration inspector is present? A. Not necessarily but I understand that it is considered desirable.

Q. Are there cases where there is not a petition for a nonquota visa but where the applicants are applying direct to the State Department for a passport, are there cases where the Immigration Service has called the parent in in that particular case where there is no proceeding before the Immigration Service, has called the parent in and re-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

quested him to take a blood test? A. I know of no situation.

Q. Is it possible? A. It may be. I have no knowledge one way or another. However, I would assume that the Immigration Service would not be called upon to assist in such cases since the State Department has various officers and officials in most areas in the United States where they could just as readily perform those functions themselves. Special Inquiry Officer to witness:

Q. However, this Service would not object to the State Department calling upon it for assistance in these matters? A. I assume it would not.

Special Inquiry Officer: Do you wish to examine the witness?

Counsel: Mr. Maltin, I renew my application for an extension of this hearing for the purpose of gathering evidence so that I may examine this witness extensively. I have filed a motion for the production of certain records and certain files which is now pending in the Federal District Court. In addition, I intend to take the depositions of various people.

Special Inquiry Officer: Would you specify just what witnesses you intend——

Counsel: I intend to take a deposition of certain officials of the Immigration Service.

Special Inquiry Officer: Why don't you make a request to me?

Counsel: May I request—well, first of all, I have this motion pending.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Special Inquiry Officer: That may very well be. I want it now because I don't know just what you have you mind.

Counsel: I would like to have Mr. Ben Myron of the Immigration Service testify and I would like to have Mr. Myron bring with him the files of all Chinese persons admitted or seeking admission to the United States as citizens or immigrants, either preference or quota visas since January, 1952, where those files have documentary evidence of that claim.

Special Inquiry Officer: I believe this witness has said that blood tests were used in cases in which there was documentary evidence and no denial is being made of that claim.

Counsel: I would like to have a chance to examine the type of documentary evidence. This witness has said that in cases where there is adequate documentary evidence no request is made. I would like to determine whether or not in those cases where a blood test was taken—I would like to lay that before you, Mr. Maltin, to determine whether that documentary evidence was adequate enough to justify the taking of a blood test. I would like to have the files of persons of other races who had documentary evidence and compare the amount of documentary evidence in those cases as with the Chinese cases and see if there is any discrimination. If it would appear that the documentary evidence in the Chinese cases and the non-Chinese cases compare in quantity and quality and

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

if a blood test is taken in a Chinese case and not other cases it would seem that there is discrimination.

Special Inquiry Officer: What you are asking is a very large order if I might say so. As far as I can see, it might be impossible to comply with that. Even in the interests of justice there are limitations to the efforts that the Immigration Service can make in compiling statistics, preparing files and gathering documents to satisfy your inquiry and I am certain that to a large extent you would have to depend upon the memory of a witness.

Counsel: Without having an examination or an inspection of those files, Mr. Chairman, I cannot cross-examine fully or test the memory of these various witnesses who are testifying from memory and testifying in a general conclusory manner, with all due respect to Mr. Friedman.

Special Inquiry Officer to witness:

Q. Mr. Friedman, let me ask you this, to clarify this subject. You have mentioned that you have some recollection of persons with documentary evidence of birth being examined through blood tests nevertheless because it was deemed appropriate? A. Yes.

Q. Do you have any recollection of the nature of those documents? A. Well, for example, in two cases specifically the children had birth certificates recorded at or near the time of their birth. They presented the marriage certificate of their parents, which was acknowledged as

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

authentic, and because an investigation abroad indicated a strong probability that the persons concerned were not related as claimed, blood tests were requested.

Counsel: Mr. Chairman, I object to the statement as to what the investigations abroad—it's speculation.

Witness: I'm telling you what the file showed.

Special Inquiry Officer: I think it's factual to a great degree.

Witness: As a matter of fact——

Counsel to witness:

Q. What files were those? A. I can identify them if you like by number and letters of the name, if you like.

Q. Do you have the file numbers? A. The files are VP 3-12504, Matter of C. D., and VP 3-12505, Matter of D. E. D. I might add that what I don't believe counsel is aware of is the fact that what he suggested as a survey would be a survey of 10, 20, 30 or 50,000 files which would take——

Counsel: I'm limiting that to January 1, 1952.

Witness: That covers a period of 2½ years. I don't know how many cases came in during that time but we do not file files by race or type of documents which means that it would necessitate going through every file to ascertain which meets the qualifications that you assert are involved, the type of documents or lack of documents that you are

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

concerned with. Some of the files are extremely voluminous and it would be an absolute minimum of tens of thousands of files.

Counsel: Mr. Chairman, you can see the inherent disadvantage which the relators are in where this witness, an employee of the Immigration Service and who is engaged actively in the process of litigation of this case testifies from his memory and gives conclusory opinions, with all due respect to his objectivity.

Special Inquiry Officer: This would relate to any witness that you call from the Immigration Service.

Counsel: I'm not limiting my witnesses to the Service.

Special Inquiry Officer to witness:

Q. Let me clarify something for the record. Will you state what Mr. Myron's position is?

Counsel: I object to that, to Mr. Friedman's testimony as to what Mr. Myron's position is.

Special Inquiry Officer: Your objection is overruled.

Witness: Mr. Myron is a subordinate officer, subordinate to the chief of the Applications Section of the Immigration and Naturalization Service.

Special Inquiry Officer: Who is the chief?

Witness: Mr. Milich is the chief of the Applications Section or acting chief.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Special Inquiry Officer: Mr. Gim, you mentioned Mr. Myron and documents. Who else did you have in mind?

Counsel: I wanted him to produce the operating instructions and the inter-office, inter-bureau and inter-department circulars written, published or received since January, 1952 dealing with the admission of Chinese as well as persons of other races entering the United States as immigrants or non-quota immigrants and also the operating instructions concerning the applications of any of these persons for certificates of citizenship.

Special Inquiry Officer: In addition to Mr. Myron and those documents, did you have any other individuals in mind?

Counsel: I have individuals who are in the Government who are not in the Immigration Service that I would like to call. I intended to take a deposition from these persons. One person is Mr. Orin Waterman of the State Department, Passport Division, Washington.

Special Inquiry Officer: Are there any other immigration officials that you had in mind that you wanted to call besides Mr. Myron?

Counsel: Not at the present time.

Special Inquiry Officer: If Mr. Myron were to appear here at my request you would still proceed with your court action, I assume.

Counsel: This is a motion not for the production of Mr. Myron. This is a motion for discovery of

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

inspection of records and files, circulars and directives.

Special Inquiry Officer: Well, as you made that request to a court I won't give any opinion as to its propriety or possibilities of success.

Counsel: In addition, Mr. Chairman, I want to take depositions of various lawyers who practice before the Immigration Service. Unfortunately, since I only returned to the City this Monday——

Special Inquiry Officer: In so far as depositions are concerned, I can see their usefulness for persons not in this city or not available, but if they are available it might be well to present them as witnesses.

Counsel: I might say for the record, Mr. Chairman, that various lawyers who practice before the Immigration Service are naturally reluctant to appear as witnesses.

Special Inquiry Officer: If they give their deposition and they are available in New York I would see no necessity for that.

Counsel: If I take a deposition pursuant to the Federal rules these people have no alternative but to give a deposition.

Special Inquiry Officer: Well, actually I won't suggest to you what other procedures are available but certainly there are other procedures available through this Service to do what you are trying to accomplish but since it does not encompass all the things you are trying to accomplish, we will let it go. When is this motion returnable?

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Counsel: November 4 is the next motion date which is available. Since Mr. Friedman is in the city and while I appreciate that he is a busy man, I think he will be perfectly willing in the interest of justice to appear for cross-examination when the hearing is resumed. Mr. Chairman, I request that an adjournment of this hearing be given so that I may obtain evidence bearing on the issue of racial discrimination by means of investigation, and at that time I request that Mr. Friedman be recalled to permit cross-examination and at that time I will be permitted to produce evidence bearing on the issue of racial discrimination.

Special Inquiry Officer: I will grant you an adjournment. However, before doing so, as Mr. Friedman has appeared here today and I have no way of knowing whether you will have another question to ask him on a later date, I ask that you examine him now on the matters to which he has testified and I will then be in a better position to judge whether he must be recalled after you have presented other evidence.

Counsel: May I state that Mr. Friedman has given a lot of general testimony based on his general recollection of various files which he has seen during his entire tenure of service with the Immigration Service and naturally in that testimony a lot of conclusions and a lot of opinions were given without disclosing specifically what they were based on and I feel in order to effectively cross-examine Mr. Friedman I will need further informa-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

tion which will be obtained, as I stated before, by investigation, depositions and interrogatories, and I prefer to examine Mr. Friedman at the reconvened hearing.

Special Inquiry Officer: In the event, Sir, that your request to the court is denied in its entirety do you propose to submit at a continued hearing any evidence which you yourself will have available?

Counsel: Mr. Chairman, let me state that this motion to the Court is for the production of documents. I intend to take depositions which has nothing to do with this motion. At the reconvened hearing if the depositions are available I intend to submit them and I intend to submit affidavits and perhaps some witnesses who will appear, if I can get them.

Special Inquiry Officer: I must point out to you that some of the requests that you are making to the court I could not act upon favorably because I do not have the authority to reveal the contents of immigration files which have been declared by the Attorney General to be confidential. In so far as the production of witnesses is concerned you are aware, of course, that I have the subpoena power in an appropriate instance which can be exercised. It would seem best that you at least for your own good as well as for the good of the Service, make your request to me if you think that I can act upon it so that first of all the court will be in a better

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

position to act upon your request to them and we can narrow this down a bit.

Counsel: May I say at this point that depositions and interrogatories may reveal the names of witnesses who I do not know now. Furthermore, my investigation may reveal the witnesses whom I intend to call whom I don't know now.

Special Inquiry Officer: When you say depositions are these depositions to be taken only upon order of the court? Will a request be made to the court to obtain those depositions?

Counsel: If the party opposing the taking of the deposition opposes, they make—they can make a motion to quash it but all that is needed is a notice to take a deposition.

Special Inquiry Officer: In relation to the writ that you have in court?

Counsel: Yes.

Special Inquiry Officer: That's closed as far as I can see except for this proceeding.

Counsel: The order specifically provides that further and final orders may be made to the court. The writ is pending.

Special Inquiry Officer: I will grant an adjournment to permit you to apply to the court for relief which you cannot obtain from me. However, in order to circumscribe this hearing and keep it within timely bounds, this hearing will be rescheduled in the near future, at which time reasonable notice will be given to you——

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Counsel: May I ask for three days notice?

Special Inquiry Officer: Yes, and you will be expected to produce, if you have it, any independent evidence of any significance which you wish to present to me on the question of discrimination which doesn't need the order of the court to have produced before me, such as testimony of witnesses whom you can get to appear or any other documentary evidence that you may obtain. The purpose of this you understand, Mr. Gim, is not to let this matter run on interminably. You have known of this issue for a long time and you have pressed it and if you are just now going to seek outside of the aid of the court in searching for evidence to support your claim, it's a little late and I'm going to press you to produce before me whatever evidence you have. I think that's a reasonable request. A notice will be sent to you in the near future and you will be given more than three days notice and bear in mind that you should take steps immediately to gather whatever evidence you can and to have whatever witnesses available you desire to present.

Hearing adjourned.

I certify the foregoing to be a true and correct transcript of my shorthand notes of the testimony taken by me in the above case.

SHELDON HANDSCHUH
Sheldon Handschuh,
Reporter.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

I certify that to the best of my knowledge and belief this record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record.

AARON I. MALTIN
Aaron I. Maltin,
Special Inquiry Officer.

AIM:sh

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

New York, New York

[SAME TITLE]

File Numbers:	0300-473253, 254, 255
Special Inquiry Officer:	Aaron I. Maltin
Shorthand Reporter:	Magnetic Love
Date:	December 10, 1954
Hearing held at:	70 Columbus Avenue New York 23, N. Y.
Language:	English
Counsel for: Lee Kum Hoy Lee Kum Cherk	Benjamin Gim Firm of Hong & Gim 551 Fifth Avenue New York City, N. Y.
Counsel for: Lee Moon Wah	Edward J. Ennis, Esq. 165 Broadway New York City, N. Y.

Special Inquiry Officer to Attorney Gim: I notice today, sir, that you appear here with co-counsel.

Attorney Gim to Special Inquiry Officer: Yes. Mr. Ennis represents Relator Lee Moon Wah.

Special Inquiry Officer to Attorney Ennis:

Q. Mr. Ennis, will you identify yourself for the record? A. Edward J. Ennis, 165 Broadway, New York City, admitted to practice before this Service.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

By Special Inquiry Officer: I believe that Mr. Friedman, who is here now, will be cross-examined and while Mr. Ennis now represents one of the Applicants, it would appear to me he is co-counsel, rather than representing a distinct individual and I'd like to confine cross-examination of Mr. Friedman to one of your gentlemen. Which one of you gentlemen would want to cross-examine Mr. Friedman?

Attorney Gim to Special Inquiry Officer: Let me put it this way, Mr. Chairman, we won't both be cross-examining at the same time. So, may I say this, that I will do most of the cross-examining but I do not certainly want to preclude Mr. Ennis from any questions he may wish to ask.

OFF RECORD DISCUSSION

ON THE RECORD

By Special Inquiry Officer: All right. We'll just discuss the matter further when you have concluded your cross-examination.

Before proceeding further, at the last hearing you were in the process of taking some steps with regard to this matter. Would you care to state for the record, so that we have a complete file, just what happened between the last hearing and this with regard to your motions?

Attorney Gim to Special Inquiry Officer: Well, the Relators made a motion under Rule 34, Rules

of Civil Procedures, for the production of documents and records, that was denied, and Relators also submitted interrogatories to the respondent under Rule 33 of the Federal Rules of Civil Procedures. The respondent brought or made a motion to vacate the interrogatories and the interrogatories were vacated.

I wrote you on November 17th requesting that you subpoena certain records and files and to allow me to examine this evidence a week before the reopened hearing. Now, I want to ask whether or not you received that letter dated November 17th?

OFF RECORD DISCUSSION

ON THE RECORD

By Special Inquiry Officer: Unfortunately, your letter of November 17th never reached my desk but as I have just read the copy of the letter which you furnished me, I'll answer your request now. With regard to your request for files of any group of persons or individuals that you name, the files of the Immigration Service are all confidential by order of the Attorney General and you could not examine them under any circumstances. In addition, I might note parenthetically, your request for all files of certain groups would be impossible to comply with even if we were disposed to do so because we keep no separate groupings, files are just kept by number and the thousands upon

thousands of files which would be involved in your request could not be assembled unless a staff of persons were assigned for a year—and even then, they might not be successful in doing a good job. That's in answer to the request that you made in various subdivisions that you set forth as "c", "d", "e" and "f".

With regard to your request in "a" and "b", anything that is published by the Immigration Service as a guide to employees and which is available to the public, such as the regulations promulgated pursuant to law, are of course, available to you. I'm sure that's not what you have in mind insofar as other intra-office instructions. Unless the administrative heads of this Service are disposed to make them public, I would not direct that they be furnished, so that your request in paragraphs "a" and "b" will have to be denied.

Mr. Friedman, who is here as a witness, I'll call upon in the course of this hearing, to look at these two requests and tell me, as he is one of the Administrative Officers and acting under the direction of the District Director, whether they are and if he is disposed to make them public and a part of these proceedings.

Attorney Gim to Special Inquiry Officer: Mr. Chairman, I realize that perhaps the production of files at this time might certainly be burdensome and that may not be necessary.

Now, I was hoping that perhaps the Service might consent to the production of the Operations Instruc-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

tions which were in effect in January 1952 and up to probably the end of the year, which is the time these Relators were blood tested and also make available a description of all the directions and instructions and orders published or received by the Immigration Service, whether orally or in writing with regard to the use of blood tests in paternity determinations. Now, perhaps, if we can have those items specified under "a" and "b" of the letter made available, the examination of those items might dispense with the necessity of "c", "d", "e" and "f". We are interested in being reasonable in this matter and in conducting this hearing as expeditiously as possible. However, we feel it would be unfair to us to allow Mr. Friedman to testify inasmuch as the purpose of his testimony is to deny that there is any racial discrimination,—and to testify from his knowledge of the records and directives of the Immigration Service and at the same time not permitting the Relators to examine those directives and orders.

Special Inquiry Officer to Mr. Friedman: Mr. Friedman, I might ask you at this time whether there are any orders which can be publicly revealed?

Mr. Friedman to Special Inquiry Officer: I think it should be made very clear and I think possibly it was not made too clear in the original testimony that I gave, that there are no directives of any kind dealing with the use of blood tests in Exclusion Proceedings. The use of blood tests in Exclusion

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Proceedings is based entirely upon the precedent decision of the Board of Immigration Appeals in the case of Lee Fay Fan. A copy of the Lee Fay Fan decision has been attached to the administrative record in this case, if my memory serves me correctly, and is the administrative basis for the use of blood tests in exclusion cases of this type,—that is, where issues of paternity are involved. There are no directives of any kind other than that precedent decision, dealing with blood tests in Exclusion Proceedings.

Now, as far as other directives are concerned, there are directives dealing with the use of blood tests in other types of investigations conducted by the Service but not with respect to Exclusion cases except, as I have said, the precedent decision of the Board of Immigration Appeals.

Special Inquiry Officer to Mr. Friedman:

Q. Is it your testimony then, sir, that the Immigration Service operated and does operate insofar as Exclusion Proceedings are concerned, in accordance with the plan or idea set forth in that decision? A. Yes, it is the Lee Fay Fan decision which is the basis for authorizing the use of blood tests in Exclusion Proceedings and not any directive by any administrative official.

Attorney Gim to Mr. Friedman:

Q. Mr. Friedman, do you recall the exact date of the Lee Fay Fan case? A. I believe, if I'm not mistaken, that

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

it's early 1953. However, it's in the record of this case and I think we can refer to it very readily.

OFF RECORD DISCUSSION

ON THE RECORD

A. (By Mr. Friedman, continuing) It is February 25, 1953.

Q. And you say that that decision is the authority to conduct blood tests in Exclusion Proceedings? Is that right? A. Ever since that decision,—well, let me put it this way: before the Lee Fay Fan case, the Immigration Service had started to use blood tests and the use of such tests was to be tested administratively and the Lee Fay Fan case is the authoritative precedent permitting or authorizing the use of such blood tests as evidence in exclusion hearings.

Q. But you're certain then that the Lee Fay Fan case is not the original authorization for conducting blood tests? Is that right? A. Well, it is the final authorization.

Q. But that did not set the blood tests into operation? A. No, I have already covered the source of origin of the blood tests in my original testimony, indicating very briefly that it had originated with the State Department.

Q. Mr. Friedman, who authorized the blood tests of these Relators? Who directed the blood testing of these Relators? A. That was an investigative determination on the District level.

Q. Who did that? Who issued the order to have these

Relators blood tested? A. I have no personal knowledge of who made the initial determination that a blood test was in order in this particular case, but it was made on an administrative investigative level and not by any general directive and not by anyone not familiar with the investigative phase of the case dealing with Special Inquiry Hearings.

Q. Is it your position, Mr. Friedman, that at the time these Relators were blood tested, which is July and August of 1952, there was no reference at all in the Operating Instructions to the matter of blood testing of Chinese persons? A. In Exclusion cases, no!

Q. In *any* case? A. There may have been some directions or instructions concerning the use of blood tests in other types of procedures but none in Exclusion proceedings.

Q. Are you testifying on the basis of what you remember or are you stating categorically that this is so? A. I have checked to ascertain whether or not there were any instructions with relation to Exclusion proceedings and I have found none.

Q. There may be some which you don't know about? A. It is inconceivable that there would be any that I have not found since I have checked every possible source.

Q. Now, were there any oral instructions concerning blood tests in Exclusion cases of Chinese persons? A. I couldn't very well answer that unless I happened to hear the instructions and I heard none. However, there is no doubt in my mind that there were extensive discussions in individual cases on the investigation's level as to which

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

cases should or should not be required to submit to blood tests.

Q. Now, how would you or an inspector know what to do insofar as the procedure of taking blood tests are concerned, at the time these Relators were blood tested? A. If the investigator in charge of the case or the immigration officer determined that a blood test was required, with the authorization of his supervisor, he could require—

Q. (Interposing) How would he know where to go, where to take these people? How would he know how to present these people? A. Aren't those procedures set out some place? A. The early procedures were very informal and were based on the experience that had been gained in using the Public Health Service, which started to use blood tests for the State Department.

Q. Are those procedures set out in writing? A. There are investigation techniques in our instructions as to the manner in which blood tests should be taken, but those are all very, very recent, originally, at the time these blood tests were taken,—there were no such instructions.

Q. Is it your testimony that at the time these persons were blood tested, there was no reference in the Operations Instructions concerning blood testing of Chinese persons in any type of proceedings? A. There may have been some instructions with reference to the blood testing in other proceedings, that is other than Exclusion proceedings,—there are such instructions, but whether they existed at that time or at that particular date I cannot state.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Attorney Gim to Special Inquiry Officer: Now, Mr. Chairman, I'd like to have, in view of the fact that the witness's knowledge on that matter is inconclusive, I'd like to have the Operations Instructions in effect in July or August of 1952 at the time these Relators were blood tested.

Special Inquiry Officer to Attorney Gim: Let me point out to you what you have already offered as an exhibit, which is now Exhibit #23, and that's a letter on the stationery of the Public Health Service dated May 8, 1952 and the Subject of which is: Blood-Type Testing on Request of Immigration and Naturalization Service, and the opening paragraph of that letter says that:

> "The Immigration and Naturalization Service has received a request from the American Consul in Hong Kong for the blood typing of certain United States citizens of Chinese descent who are claimed as parents by foreign-born applicants for United States passports."

This appears to me, unless you are able to produce an earlier memorandum of the Public Health Service, to be the initial arrangement with the Public Health Service to have these blood tests conducted and it is also clear that this thing started because the State Department started to do it and requested that we carry it out. This letter seems to imply that very clearly.

Attorney Gim to Special Inquiry Officer: Mr. Chairman, I'd like to have a ruling by you as to whether or not the Relators may examine the Oper-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

ations Instructions in effect July, August and September of 1952.

Special Inquiry Officer to Attorney Gim: I have not at these proceedings even admitted that there are Operations Instructions——

Attorney Gim to Special Inquiry Officer, (Interposing): Then, you deny the request? Is that right?

Special Inquiry Officer to Attorney Gim: I'll have to deny your request.

OFF RECORD DISCUSSION

ON THE RECORD

By Special Inquiry Officer: I have been a Special Inquiry Officer and I've been a Chairman of the Board of Special Inquiry for many years and it was my understanding from conversation with other officers in this District operating in those similar positions, that having heard about the State Department using blood tests in Chinese cases in Hong Kong successfully and having heard that the American Consuls were requesting the Immigration Service to assist them in conducting blood tests of persons in New York so that they might make their determinations, that individual persons who acted as Chairman of the Boards in the City of New York, when they had difficult cases which couldn't be solved in the way they had been decided in the past, thought it was a good idea to ask the Public Health Service, which does all

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

of the Immigration Service's medical research, to do this for us too. And they as individuals, when they had an individual case which was difficult, sent the people to the Public Health Service and said, "Blood test these people and let us know what the results are,"—because they had heard, I believe in 1951 or '52, that this could be done. Insofar as specific instructions, I can make no statement because I don't know enough about it to testify in any way and I don't want to intrude myself too much into the hearing.

Attorney Gim to Special Inquiry Officer: In view of the fact that you have very helpfully testified about the initiation of the practice from your knowledge, I think, in fairness you should tell us what else you know about it, such as for example, did this practice become regularized, in the form of any written instructions in the Operations Instructions or otherwise?

Special Inquiry Officer to Attorney Gim: Well, on that point, Mr. Friedman, who has made a search specifically for that question, could answer, because I have made no specific search of all of the Instructions dating back or memoranda relating to it. As a matter of fact, I might not see them all, and if he is prepared to testify as he has, from his expert knowledge of that situation——

Attorney Gim to Special Inquiry Officer, (Interposing): Perhaps your knowledge would go so far as to say whether you ever saw in writing in

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

any discussion of Immigration Service procedures, any references to blood tests.

Special Inquiry Officer to Attorney Gim: I have no recollection of instructions with regard to blood tests specifically. And in view of the fact that I feel this is a legal matter, that even if there were instructions which designated Chinese persons to be blood tested where appropriate or where questions arose which couldn't be solved in any other way, this would not legally constitue prejudice, so that I don't know if it's worthwhile to know my feelings on that point, to discover, if we can discover, whether there are such directives or whether there have been such directives.

Attorney Gim to Special Inquiry Officer: One of your functions is to make an adequate record for review by your Administrative Appellate Court of the Board of Immigration Appeals and for the courts, now, since it may very well be that these reviewing bodies may disagree with your view as to whether instructions limited to Chinese would raise a legal question, we'd like to make that record—and that's why we ask for the information from the Service, either through Mr. Friedman's testimony or in any way that the Immigration Service finds it suitable to give it to us for the record.

Special Inquiry Officer to Attorney Gim: I feel that Mr. Friedman's testimony is adequate. He has stated quite plainly that he has looked into the matter and he has found nothing in relation to Exclusion cases.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Attorney Gim to Special Inquiry Officer: Then, we would like to know, I would like to ask Mr. Friedman will he now summarize what the Operations Instructions or other written directives, discussing the procedures in the Service, say about blood tests in proceedings other than Exclusion proceedings.

Mr. Friedman to Attorney Gim: Let me start at the outset by stating to my knowledge the whole thought of using blood tests originated on an individual basis. Mr. Maltin has already indicated in Exclusion cases—it was not until long after blood tests were used in Exclusion cases that the thought even entered the consideration of the Immigration Service as to using blood tests in other types of cases. So, that any instructions with reference to the use of blood tests in other cases would have come after and not before the use of blood tests in Exclusion cases. Secondly, any instructions dealing with the use of blood tests are instructions dealing almost entirely with investigation techniques. Obviously, the disclosure of investigation techniques in any type of case would be highly prejudicial to the Government for the very obvious reason that anyone who was forewarned as to the precise manner in which a Government agency intends to conduct an investigation, would be in a much better position to take steps with either thwarting that investigation or to commit some fraud—and with advance knowledge of how he might best commit such fraud with

the least possibility of detection. In other words, it would be highly prejudicial to reveal precisely in what manner the Government proposes to conduct blood tests or any other investigation. For that reason, all instructions on that subject are confidential and cannot be disclosed.

However, as I have already stated, the principle instructions dealing with the use of blood tests and the techniques and safeguards that must be used administratively, do not deal with any person's race or nationality, they are general instructions, having not the slightest bearing upon a person's race! I have already indicated that there are some instructions dealing with cases other than Exclusion cases which do happen to mention Chinese.

By Attorney Ennis: May we have a copy of those?

Mr. Friedman to Attorney Ennis: Those instructions are also confidential and would disclose investigation techniques.

By Attorney Ennis: Now, about these investigation techniques,—obviously there's nothing secret about the techniques of taking a blood test, but assuming that it is, we don't ask for that part of the instructions,—that part which discusses the technique of taking a blood test, we are perfectly content to have that secret, concealed from us, we would like the text of that part of the instructions which as Mr. Friedman says, refers to Chinese.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Mr. Friedman to Attorney Ennis: Well, in the first place I want to make it very clear that the instructions which refer to Chinese have no bearing whatever on Exclusion cases and were promulgated long after the blood tests originated in Exclusion cases, therefore—in the first place, I feel they are wholly irrelevant to any proceeding that we have in the instant case, and in addition—the Government cannot open the door to the disclosing of investigation techniques by offering one portion and withholding another portion of a directive. They are either confidential or they are not confidential and we must as a matter of precedent and protection of the Government's interest, insist upon the confidential nature of any such instructions.

By Attorney Ennis: May we take it then to be the position of the Service that it will not, either by production of the text or a summarization of the instructions, give us the factual basis for determination?

Special Inquiry Officer to Attorney Ennis: If Mr. Friedman as Representative of the Administrative Branch of this Service takes the position that he has, I'll not order him to do otherwise.

Mr. Friedman to Attorney Ennis: I think it should be made eminently clear, that there is nothing that you ask for that exists which we consider even remotely relevant to this issue.

Attorney Ennis to Mr. Friedman: Well, the determination of relevancy is not for the administrative officers of the Service.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

By Attorney Ennis: They have identified a written instruction in respect to blood tests which mentions Chinese and we ask for that text or a summary of it insofar as it does not involve revealing of an investigative technique.

Mr. Friedman has not even seen fit to tell us what type of procedure that instruction has been issued concerning,—that could hardly be a confidential matter.

What I'd like to ask now, is that do I understand that Mr. Friedman's testimony speaks as the final word of the Service in the matter?

Special Inquiry Officer to Attorney Ennis: As I have said, as Mr. Friedman has testified that he has examined the question and searched the files with regard to instructions and memoranda and states that those instructions which do relate to Chinese which he has discovered are in other types of proceedings,—and I can speculate pretty well as to what type of proceedings they are——

Attorney Ennis to Special Inquiry Officer, (Interposing): So can we all and there's no practical reason why Mr. Friedman can't say so.

Mr. Friedman to Attorney Ennis: Well, I can say that the proceedings in which such instructions have relevancy deal only with visa petitions and certificates of citizenship.

By Special Inquiry Officer: That was my understanding also of the situation.

By Attorney Ennis: That was my surmise. I

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

don't see that it's at all hurtful for the Government's case to say so.

Mr. Friedman to Attorney Ennis: And that's why it has been stated:

Attorney Ennis to Mr. Friedman:

Q. Well, what do the instructions say about Chinese in visa petition cases? A. I think it would not be prejudicial to state generally that the instructions deal with the use of blood tests in cases where there's a sharp issue of paternity and identity by reason of lack of sufficient evidence other than blood tests to resolve that issue.

Q. What is the nature of the specific reference to "Chinese" in the instructions? A. The instructions merely mention Chinese cases as those which commonly involve the lack of sufficient evidence.

Q. What is the language the instructions use which you have just paraphrased in your last answer? A. I do not recall the precise language and if I did, I think that the disclosure of the precise language would be prejudicial.

By Attorney Ennis: We request that that language be examined by the Special Inquiry Officer and that he make a ruling as to whether in his opinion, the phrase or clause or sentence which refers to Chinese, would prejudice the Government by its disclosure. In other words, we want the impartial ruling of the Special Inquiry Officer on

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

that point rather than that of Mr. Friedman, the Counsel for the Government and the witness.

OFF RECORD DISCUSSION

ON THE RECORD

Special Inquiry Officer to Attorney Ennis: With regard to your last request, I believe that it is not possible to separate and to make a part of this record, just a small portion of any instruction or memorandum, particularly this one which you are desirous of having revealed only insofar as it relates to the word "Chinese"—because it would make no sense unless the complete sentence or paragraph were revealed. These directives are confidential and as the Administrative Branch of this Service has declined to reveal them, I'll not direct that they be revealed. I understand from the conversation which we have had off the record, that Mr. Friedman is prepared to make some further statement for the record which for whatever it is worth I would like to have included.

OFF RECORD DISCUSSION

ON THE RECORD

Attorney Ennis to Special Inquiry Officer: I understand the last answer is based not on any examination of the instruction at this time but on your recollection of it from some former examination?

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Special Inquiry Officer to Attorney Ennis: That is true. I have other instructions before me which use the word "Chinese", and my distinct recollection of this instruction is pretty general, so that it would be impossible to take out what you request, if the Government were willing to do so, and just put into the record the exact words referring to Chinese and not reveal the entire sentence in which it appears because it wouldn't make any sense without the entire sentence or paragraph here.

By Attorney Ennis: I request that the Special Inquiry Officer make this ruling on the basis of the current examination of the instruction and not upon his recollection or his examination of other instructions.

Off Record Discussion

On the Record

Special Inquiry Officer to Attorney Ennis: I'll only take the text to which we have all referred and read it once more to refresh my recollection although I believe I have a good recollection of it and will indicate at that time for the record what I believe will be a confirmation of whatever I have already said, but I'll speak about it further after I have examined it more carefully.

Now, before we proceed further, is it your intention to further cross-examine Mr. Friedman?

By Attorney Ennis: Yes.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

By Special Inquiry Officer: Well, who's going to further cross-examine Mr. Friedman?

Attorney Gim to Special Inquiry Officer: I will.

Special Inquiry Officer to Attorney Gim: Before you do that, Mr. Gim, Mr. Friedman has a further statement for the record.

By Mr. Friedman: I think Counsel will be satisfied with a brief summary of the development of any instructions with reference to blood tests and in that regard, to put it very briefly:—at the time the subjects of this proceeding arrived in the United States there were no instructions of any kind relating to blood tests and I have already indicated in my prior testimony that it was not until either late in 1952 or early in 1953, somewhere in the time period in which the Lee Fay Fan decision of the Board of Immigration Appeals came down, that any instructions at all were made by the Service with respect to blood tests.

The early instructions dealt only with visa petitions and certificates of citizenship. They did not directly or indirectly concern themselves with Exclusion proceedings. While the early directives did mention the use of blood tests specifically in Chinese visa petition cases and applications for certificates of citizenship, those instructions at no time made the use of blood tests exclusive as to Chinese and at no time precluded the use of blood tests as to any other persons.

More recently, sometime this year, in 1954, all of

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decisi n of September 1, 1954, Reported in 123 F. Supp. 674

those instructions were rescinded and all current instructions concerning the investigation techniques with respect to cases wherein blood tests are deemed essential or necessary, do not directly or indirectly refer to any racial or nationality group but predicate the requirement on the nature of the case and the issue of paternity or relationship which is involved.

I also want to again emphasize, that no instruction of any kind as to Chinese or other persons, has been issued with respect to Exclusion hearings before Special Inquiry Officers.

OFF RECORD DISCUSSION

ON THE RECORD

Special Inquiry Officer to Attorney Gim: Before you cross-examine Mr. Friedman further, I'll make at this time an exhibit of the copy of your request of November 17, 1954 on your statement that such a letter was transmitted to me. This will be marked Exhibit #26.

You may proceed, Mr. Gim:

Attorney Gim to Mr. Friedman:

Q. Now, Mr. Friedman, I believe in your last testimony here that you testified—that in cases of Chinese persons applying for admission to the United States claiming to be the foreign born son or daughter of an American citizen, that blood tests were required in some cases even though the son or daughter concerned presented a birth certificate

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

or some other documentary evidence of their identity. Is that right? A. That is true.

Q. Now, I believe you further explained that the mere presence or the presentation of a birth certificate or other documentary evidence of identity is only one of the many criteria for determining whether a blood test, to prove relationship to the American citizen parent, is required or not. Is that right? A. That is true.

Q. Now, I believe that you stated that the principal and the most important criteria for determining whether or not a blood test is required to prove the relationship is whether or not the American Consul can speedily and readily conduct an investigation in the area where the child is claimed to have been born and could obtain from neighbors, friends, local Government officials, the exact identity of the child. Is that right? A. That is true.

Q. Now, I think your view, being that if the Consul could conduct a thorough investigation in the area where the child claimed to have been born and talked to the neighbors, and the Government officials and checked the records, the local police records and hospital records, etc.,—that a blood test would not be necessary to prove an obvious relationship. Aren't those your words? A. I would say that a blood test would be less likely to be necessary but I can't make a hard and fast ruling since no two cases are precisely alike.

Q. Now, let me read you some testimony, Mr. Friedman, and ask if you will recall this particular statement. It's on Page 80, near the bottom of the page:

> "In addition, and perhaps the most important feature, all such cases would be with the American

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

consulate abroad who could readily and speedily conduct an investigation in the area in which the child is claimed to have been born and could ascertain from neighbors, friends, local government officials and other sources the true identity of the child."

Now, let me add parenthetically that in this instance you were talking about the particular pattern of a case where the parent goes abroad and does not maintain contact with the consulate, nevertheless, he is able to produce documentary evidence from where the child is claimed to have been born in the area where the counsul is. A. That's true.

Q. I believe you said in such cases, a problem of identity in relationship would rarely arise and there would be no need for using blood tests to verify an obvious relationship? Now, I ask you, in view of recalling this past testimony, would you say that where the consul can investigate the area where the birth is claimed and talk to neighbors and friends, that the necessity of requiring a blood test would rarely arise? A. That is true.

Thank you.

Q. Now then, am I correct in saying that your position is that the most important and the primary factor then in determining whether a blood test is required or not, is the ability of the consul to conduct a thorough investigation concerning the circumstances of the applicant's birth in the area where he is claiming to have been born? A. I'll put it this way:— It is more important than any other single factor but it is not the determining factor.

Q. But it is the most important factor of all the cri-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

teria? A. Of all the factors that I would consider the most important.

Q. You would say that the mere presentation of birth certificates or other documentary evidence by itself is not—while it is one of the criteria for determining whether blood tests are required, is not nearly as important as the criteria that you named, namely, the ability of the consul to conduct a thorough investigation in the area of the person's claimed birth. Is that right? A. As between the two criteria I would say that the possibility of a complete investigation outweighs the document in itself.

Q. So it's more important than the mere presentation of the document? A. I would say it is.

Q. Thank you. Now, this criteria, this principle criteria or the most important criteria, namely, the ability of the consul to conduct an investigation of the essential facts of identity, that is, conduct an investigation in the area where the birth is claimed as being primarily determinative as to whether or not a blood test is taken, is that your own personal view point or is that the view point of the Immigration Service and the Department of Justice? A. As far as I know, it is a widely held view point of everyone with whom I have come in contact who has conducted investigations in such cases and who has had the responsibility of adjudicating or determining whether in his mind the case was bona fide or fraudulent.

Q. Would that possibly be the view point of the Commissioner? A. I cannot speak for the Commissioner personally.

Q. Would you say that he would take a position contrary to yours? A. He may or may not. I can't say.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Q. Would you say that this is a widely accepted view point held by all responsible personnel in the Immigration Service? A. I would say that it is at least, a viewpoint of all persons having investigative responsibilities and the responsibility for making initial determinations as to whether a case is genuine or fraudulent.

Q. Would this be the viewpoint of—say, your superior, Mr. Steinberg? A. I assume it would.

Q. Would this be the opinion of your colleagues in the District Counsel's office? A. I assume it would be.

Q. Including Mr. Max Blau? A. I assume so.

Q. Would this be the position of a person who represents the Immigration Service in court, say for instance, Mr. Raby? A. I can't speak for Mr. Raby.

Q. Would this be the position of Mr. Harold Tyler, who you work with? A. I cannot speak for Mr. Tyler except to say that in conversations that I have had with him, I would conclude that he agrees with this view.

Q. Now, has this criteria which you speak of, that is namely, the ability of the consul to investigate the area of the applicant's claimed birth, would you say that criteria has existed since the inception of the blood tests? A. This is a criteria that goes back many, many, many years. It is nothing new.

Q. So, in other words, it would go beyond the period when blood tests were first initiated. Is that right? A. No question about it.

Q. So, it's a long standing criteria? A. It's a long standing factor and a long standing investigation technique in any case,—any case where there is an issue of identification or relationship.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Q. Mr. Friedman, I believe in your last testimony you used the word "criteria" did you not? Not that we're going to quarrel about words, but—would you say that this is a long standing criteria? In other words, a criteria possibly antedating the date of the blood tests? A. Yes, of course. But of course before blood tests were thought of it was not a criteria for blood tests, it was merely a criteria for determining the difference between bona fide and fraudulent cases.

Q. Now, Mr. Friedman, may I show you this Brief? A. (Mr. Friedman peruses Brief) Is that the Brief that was submitted by the Government in this very case in the first proceedings before Judge Dimock?

Q. Yes, it was. Now, was it not in that case that the charge of racial discrimination among other allegations were raised? A. I assume so,—yes.

Q. May I have that, please. (Brief returned to Counsel) Now, Mr. Friedman, may I read from Page 15 of the Brief of the Government wherein it states that:

> "The Service has no rules or regulations singling out Chinese persons for blood tests; such tests are said to be required as a matter of policy for all persons attempting to enter the United States without birth certificates and similar documents."

Now, Mr. Friedman, I ask you in view of that sentence, does that say that the Immigration Service requires blood tests in those cases where the consul cannot conduct an investigation in the area of the person's claimed birth? A. I——

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Q. (Interposing) Yes or no, please! A. It speaks for itself and the answer is obviously "No".

Q. But it does say that blood tests are required as a matter of policy for all persons attempting to enter the United States without birth certificates and other similar documents. Is that right? A. That is correct.

Q. Now, Mr. Friedman, may I show you an Affidavit, submitted July 22, 1953? A. (Mr. Friedman examines document.)

Q. Now, is that the Affidavit that you, yourself, prepared in answer to the Relators' petition for the writ in July 1953? A. Well, let me first state that it is not an Affidavit, it is a Return to a Writ of Habeas Corpus, that you have just shown me.

Q. I take it back. Is this not the Return that you prepared? A. It is.

Q. Now, I want to read to you, Mr. Friedman on Page 4—halfway down the page, a statement in this Return:

> "While it is true that such blood grouping tests have been requested principally in Chinese cases, these relators have not been singled out for unusual treatment since such tests are uniformly now requested of all applicants for admission who are similarly situated, without documentary evidence of any kind and whose right to admission to the United States is dependent upon a claimed relationship which could otherwise be established only by oral testimony."

A. That is a correct statement.

Q. Now, Mr. Friedman, that statement does not say

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

that blood tests are uniformly requested or principally requested, of persons claiming a right to enter the United States having been born in an area where the consul cannot conduct a ready investigation, does it? A. It does not and I would like to add

Q. (Interposing) You may explain later, Mr. Friedman, when the Special Inquiry Officer conducts a re-direct examination but in order to expedite the proceedings will you answer—"it does" or "it does not"?

Special Inquiry Officer to Attorney Gim: Let me interrupt you, Mr. Gim. When you speak of re-direct examination, you know I am not opposing the application of these Relators to enter the United States, I am merely here to decide the question and I am by no means opposition counsel to you in any sense, so that if Mr. Friedman wants to amend or add to his answer I am glad to have it because I won't conduct any redirect examination if I get everything in the record right now. It's not my job in a true sense.

Attorney Gim to Special Inquiry Officer: In your position you have a dual function, don't you?

Special Inquiry Officer to Attorney Gim: That's right.

Attorney Gim to Special Inquiry Officer: Judicial and at times, a prosecutor——

Special Inquiry Officer to Attorney Gim: I wouldn't use the term "prosecutor", but I have a dual function of developing the facts and after deciding upon them——

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Attorney Gim to Special Inquiry Officer, (Interposing): I don't think I am phrasing these questions unfairly. May I ask for a short, concise answer to that question?

Special Inquiry Officer to Attorney Gim: Certainly, Mr. Friedman will be glad to give you a short answer, but if he has some further explanation to give, I want to have it and I want to have it now and not later because I don't intend to develop counter-information at all. I don't have to examine Mr. Friedman on any point except on what he leaves me in doubt about.

Attorney Gim to Reporter: Will you read the question again, please?

Attorney Gim to Mr. Friedman:

Q. (Re-read by reporter) Now, Mr. Friedman, that statement does not say that blood tests are uniformly requested or principally requested, of persons claiming a right to enter the United States having been born in an area where the consul cannot conduct a ready investigation, does it? A. In further response to the last question I think it necessary to point out that there are many criteria which are used in connection with determining whether or not blood tests are necessary. One of those criteria is the absence of documentary evidence to establish identity and relationship. In this case, that alone would have been sufficient to require the use of a blood test and that is why that factor was emphasized in the proceedings and subsequently in the brief, but that does

not mean that other criteria would not have been just as persuasive for requiring blood tests if these subjects happened to have had birth certificates.

Q. Now, Mr. Friedman, let me read to you part of that statement again:

> "These relators have not been singled out for unusual treatment since such tests are uniformly now requested of all applicants for admission who are similarly situated, without documentary evidence of any kind and whose right to admission to the United States is dependent upon a claimed relationship which could otherwise be established only by oral testimony."

A. That is true.

Q. Now, you did not state in that Return which you prepared that blood tests are uniformly required in all cases where the consul cannot conduct an investigation in the area where the person claimed to have been born,—did you or did you not? A. I did not because it was unnecessary. You must remember that this is a pleading in which it is only necessary to set forth such factual allegations as are necessary to meet the allegations in the petition. We do not make it a practice to make extensive essays out of pleadings.

Q. Now, you just testified that the ability of the consulate to conduct an investigation is the most important criteria for determining whether or not a blood test is required. A. In speaking generally,—yes.

Q. Now, don't you think it would have been to the ad-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

vantage and for information of the court if you so thought that that was a principal criteria, to so set it forth? A. Not necessarily, because there was in this case a more specific and immediate basis for requiring a blood test and that is the absence of a birth certificate.

Q. But, as a matter of fact in this case, didn't the other criteria, the principal criteria which is specified, exist,—namely—that these persons were born in the interior of China and the consul could not conduct an investigation. Didn't that criteria exist? A. It may have existed.

Q. And therefore according to your own words—that criteria outweighs the other criteria? A. Not necessarily because when we develop criteria in a general manner we apply it to all cases in a general sense, but when you're dealing with a specific case, the criteria and the importance of specific criteria will vary.

Q. Mr. Friedman, in the specific case of these Relators we have two criteria—one is the absence of documents and the other is the ability of the consul to investigate. Now about these criteria in this case you have testified that the most important criteria is the ability of the consul to investigate, which is more important than the presentation of documentary evidence. Now, if both these criteria exist, wouldn't it have been sensible to set up the principal criteria in this case in explaining this pattern of blood tests? A. No, for another reason. The first thing that we look for, the mechanical and routine things such as documentary evidence of identity—it is only when those documents exist that we have to look further as to whether there is any need for a blood test, if those documents do

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

not exist, that in itself may indicate the requirement of a blood test and it would not be necessary to even think of any other reason.

Q. But in this answer to Relators' charge to the issue of racial discrimination you set out that the reason for the blood test requirement was because of the absence of documentary evidence. You did not in answering this charge of racial discrimination present the other criteria at that time, did you,—namely— the ability of the consul to investigate? Did you or did you not? A. We did not and there are dozens of other criteria which could be applied to this case which we also did not mention, since we felt the one criteria that was mentioned was sufficient to meet the charge.

Q. But at that time you did not set forth the principal or most important criteria which you have testified to? Is that right? A. Do you mean the inability to investigate? That's true, that was not set forth.

Q. Thank you!

OFF RECORD DISCUSSION

ON THE RECORD

Attorney Gim to Mr. Friedman:

Q. Mr. Friedman, I show you this Affidavit of September 29, 1953. A. (Affidavit perused by Mr. Friedman).

Q. Now, is this your Affidavit which you submitted to reargue Judge Dimock's first decision? A. Without reading it, I would assume it is.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

By Attorney Ennis: What's the date of it?

Attorney Gim to Attorney Ennis: September 29, 1953.

Attorney Gim to Mr. Friedman:

Q. Now, let me read you a part of that Affidavit,—it's on Page 7, top of the page:

> "The entire problem of taking blood tests where an issue of identity and paternity is involved in an immigration proceeding is very new. Only recently has the Government begun to take this added precaution. It would be sheer folly for the Government to accept readily matched and coached testimony of interested witnesses in cases wherein the issue of identity rests entirely upon such oral statements, particularly when no documentary evidence of a primary or secondary nature is available to establish substantially such an issue."

Now, Mr. Friedman, I ask you first of all, when you spoke about the entire problem you were not limiting your decision to this specific case, were you? A. I was speaking generally, but with this case specifically in mind, of course.

Q. But you spoke of the entire problem of taking blood tests, did you not? A. Yes, I did.

Q. This was not in answer to any specific Pleading was it? A. That is true.

Q. Now, in speaking of the entire problem, the overall problem, you still did not state that the primary reason a blood test is required is because the consul cannot con-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

duct an investigation or rather in those cases where the consul cannot conduct an investigation in the area of the applicant's claimed birth. Did you or did you not? A. I did not, but here I was speaking of Special Inquiry hearings and once the case has reached that stage it is too late generally for a consular investigation.

Q. Now, Mr. Friedman, will you show me any specific statement in this Affidavit where you qualified it and you limited this discussion to a Special Inquiry or Board of Special Inquiry proceeding? A. There is nothing in there specifically so mentioning, but I think the implication is quite clear since we were only discussing this case generally.

Q. Will you show me where the implication is clear in this document? A. I think it's implied by the fact that we're discussing this case.

Q. Will you show me, Mr. Friedman, where the implication is here? A. At that time this Affidavit was submitted to the court in this case and discusses the problems in this case.

Q. So, you say that now when you spoke about the entire problem of taking blood tests, you meant the entire problem of taking blood tests only with regard to Exclusion proceedings where there was no blood test taken abroad. Is that your testimony? A. That is correct.

Q. And you say that you did not, nowhere in this Affidavit, specifically mention what your intention was in that regard? A. I think the intention is implicit by the fact that the comment was inserted in an Affidavit in this case.

Q. And you say that is the basis for the implication

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954 Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

that when you spoke of the entire problem you didn't mean the entire problem but you wanted to implicate a specific situation? A. I meant the entire problem in cases such as this and all those similarly situated.

Q. Although you did not so state? Is that right? A. I think the implication was clear.

Q. But you did not so state—? A. No express language to that effect was used,—no.

Q. Thank you!

Now, I show you a much battered Opinion. A. (Mr. Friedman peruses document).

Q. Now, is that Judge Dimock's Opinion in the first case in which the issue of racial discrimination among other issues were raised? A. You have shown me the Opinion of Judge Dimock dated September 17, 1953.

Q. Now, wasn't this Opinion issued after your submission of the Government Brief and the Affidavit of July 22, 1953? A. Well, the dates speak for themselves.

Q. You would assume that the Opinion was so rendered after the submission of those Briefs,—that Brief and that Affidavit? A. I think that's obvious in the record itself.

Q. Now, let me read you a part of Judge Dimock's opinion:

> "Relators, citing *Quan Hing Sun* v. *White*, 9th Circuit 254 Federal 402, as condemning discrimination against Chinese in administering the law relating to the admission of children of citizens, charge that blood grouping tests are used by the Immigration and Naturalization Service only in cases involving

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Chinese. The Government denies this and says that they are used wherever birth records are not available."

Now, Mr. Friedman, apparently Judge Dimock felt from reading your Brief or the Brief of the Government and your Affidavit—that your contention was that the Government uses blood tests wherever birth records are not available. Is that not the apparent construction? A. I think it's the apparent construction and I think the Judge was correct and I think we still agree with the Judge, but where we seem to be differing is that you seem to imply that that is the only criteria while I'm trying to make it clear that that is only one of many criteria.

Q. That's not what I'm trying to imply, Mr. Friedman. I'm trying to get your reason why in three affidavits submitted in which you discuss the taking of blood tests from specific cases which you say relate to these particular children, in your Affidavit where you talk about the entire problem—why in any of those affidavits and in the Government Brief you never mentioned what you testified to as the most important criteria for determining whether blood tests are taken, namely, the ability of the consul to conduct an investigation in the area where the person claims to have been born? A. Because as I have already stated, there are many criteria. The one that was particularly outstanding in this case, particularly obvious and not even controversial—was the absence of documentary evidence, that is why in this case that was stressed. If we attempted to analyze this case and give every criteria which even separately and apart from docu-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

mentary evidence would have indicated the necessity of a blood test, we could have gone on for ten to twenty or more pages of Affidavits and Pleadings. However, that was not felt necessary in this case since it was felt that the absence of documentary evidence in itself justified the use of the best other available evidence to resolve the controversial issue of identity and relationship.

Q. In other words, Mr. Friedman, your testimony is that in discussing this problem of blood tests you never felt it necessary in any of these affidavits and the brief, to mention what you have testified to and what you say now, is the most important of all criteria in determining whether blood test is necessary? A. Well, you are still overemphasizing the phrase "most important"—and I still want to insist that all of the criteria are important and although one may be more important than another, rarely do we have a situation where only one exists and only one is used. They all have significance and the relative importance of one over the other may be very minor.

Q. Didn't you say, Mr. Friedman, that the most important or the principal criteria is the ability of consul to conduct an investigation? A. I would say more important relatively than any other single factor.

Q. Well, now would you say that the presence or absence of birth certificates is very important? A. Extremely important.

Q. And that is your definite testimony? A. Yes.

Q. The absence or presence of birth certificates is an extremely important criteria for determining whether blood tests are taken? A. But—by no means exclusive!

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Q. But it's an extremely important criteria? A. Definitely.

OFF RECORD DISCUSSION

ON THE RECORD

Attorney Gim to Mr. Friedman:

Q. Mr. Friedman, I read to you an Affidavit of December 23, 1953 which you submitted and in which on Page 5, you said:

> "There remains to consider the relators' attempt to again inject an issue of discrimination into this case. As to this, relators pretend that the Government has urged that the blood tests have been taken herein only because relators do not have birth certificates. Actually, that is only one, and perhaps the least, of the reasons why blood tests have been deemed necessary and essential."

Now, you just said that the absence or presence of birth certificates is extremely important. A. It is, definitely!

Q. Now, here you say—"That is actually one and perhaps the least of the reasons why blood tests have been deemed necessary and essential." Is that right? A. that is correct.

Q. Thank you. A. That is relatively! In other words, there are many factors and if we were to weigh all of them—that perhaps would weigh less, but would none the less, remain an important factor!

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Q. Now, Mr. Friedman, I believe you testified that blood tests originated with the State Department and that was largely by coincidence, because of the closing down of the consulates which caused a deluge of applications at one particular consulate in Hong Kong. Is that right? A. That is true.

Q. Now, where did you get this information? A. This information came to me through discussions of the problem at the time it originated with various officers in the Service and persons connected with the State Department.

Q. What persons in the State Department did you talk to concerning this? A. I have no recollection of that since the discussions were very informal and were purely casual—when I happened to come in contact with officers of the State Department working on cases such as this in the courthouse.

Q. Did you talk to any American Consuls concerning this case? A. I did not.

Q. Concerning this testimony? A. I did not.

Q. Did you get any letters or reports stating this fact from the State Department? A. I did not.

Q. Now, I believe you testified that after the State Department had success with these tests, these results were made known to the Immigration Service and the Service decided to use such tests. Now, was there a formal communication from the State Department to the Immigration Service indicating the degree of success with these tests? A. No, there was no formal communication that I'm aware of. The knowledge that I obtained and that was obtained by various other officers, came

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

primarily from the fact that the Immigration Service originally cooperated to a large extent in the conducting of the tests and were therefore made aware of the results and since we knew the results and were able to ascertain that those results precluded a possibility of paternity, the success of the tests became apparent.

Q. Now, these criteria that you have testified to, namely, the principal criteria in determining whether a blood test is necessary, namely,—the ability of the consul to investigate and this other criteria which you mentioned, the presence of birth certificates or other documentary evidence,—are these criteria set down for the Immigration Service in writing? A. No. I believe there is nothing in writing dealing with any criteria with reference to Exclusion cases for the obvious reason that the question of exclusion is handled primarily by a Special Inquiry Officer who is a quasi judicial officer and must determine in each case for himself what evidence may or may not have any bearing upon the ultimate issue to be resolved.

Q. Do the Special Inquiry Officers have the various criteria which you have outlined in writing? A. As far as I know, no such written instructions or criteria have ever been formulated. They are merely matters of general knowledge to investigators handling the type of cases in which such criteria have to be considered.

Q. Now, in preparing yourself to testify in this case, you are appearing as the Government expert on the matter of blood tests, is that not right? A. I assume so.

Q. Now, who designated you as the Government expert? A. I have no recollection of that because at first I did not know that I would be selected at your request to appear

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

here in that capacity. That information was made known to me in a clerical manner but I don't believe that I was ever informed as to which official made the decision that I should appear.

Q. Well, how were you informed to appear as the expert in this matter? A. I received a telephone call while at the United States Courthouse that I'd been requested to appear at your request for examination in connection with the Service's position in these matters.

Q. No! Now, let's get the record straight. I did not request at the first hearing that you appear as an expert concerning matters relating to blood tests and/or— A. (Interposing) It is my understanding that you asked for a Service official with knowledge of the background of blood tests and apparently, I was selected as the one person who apparently had the most intimate knowledge in this——

Q. (Interposing) I want to make the record clear that I did not ask immediately,—prior to this reopened hearing, I did ask at the first reopened hearing that an official testify with regard to blood tests.

By Special Inquiry Officer: As I understand it, the Judge's Order required that some Government official appear and give testimony with regard to his knowledge.

Attorney Gim to Special Inquiry Officer: All right.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Attorney Gim to Mr. Friedman:

Q. Mr. Friedman, when were you so notified to appear at the second reopened hearing? A. I would say, roughly —a few days before the hearing was scheduled.

Q. And how long did you spend in preparing yourself to be an expert on Chinese cases and/or blood tests in the policy of discrimination or no discrimination? A. You mean between the time I was notified and the time I appeared?

Q. Yes. A. No time at all.

Q. Did you go down to Washington to check for directives and cases to see whether or not there is any statistical data concerning the number of Chinese and/or other persons tested? A. It would be unnecessary to go to Washington.

Q. Did you or did you not? A. I did not because it would have accomplished no purpose because all directives of a statistical nature, they are distributed to the field, they are not merely retained in Washington and statistical data of the type that you are apparently requesting, as far as I have been able to ascertain, has never been developed or maintained.

Q. How far did you go on ascertaining substantially whether statistical data was kept? A. I ran through to ascertain whether anything is broken down into the type of information which you requested and I found no such break-down of statistical data.

Q. Did you send a communication to Washington to see whether or not any statistical data was kept as to the

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

number of persons blood tested? A. No, I did not and I have no reason to believe that Washington would have any information that would not be had in the field.

Q. Did you go to Washington, in the Passport Bureau, to learn what the conditions are in Hong Kong, the number of applications there, the particular problems faced there? A. I did not.

Q. Now, I believe you testified that there are only seventeen cases involving Chinese which came before the Board of Special Inquiry? A. I testified that I am only aware of seventeen cases involving blood tests which came before Special Inquiry officers in Exclusion proceedings.

Q. Weren't you also aware in your knowledge of these proceedings that Dr. Cameron had testified that (on Page 63 on the record) he had handled two hundred blood test cases for the Immigration Service? A. If that is so I assumed the vast proportion would have been for the State Department or it may well be that many tests were taken and the subjects were found fully in order and the subjects were admitted to the United States on primary hearing and no record of any kind would have been maintained.

Q. You say that those two hundred blood tests were taken for the State Department? A. I say that some of them might have been taken at the request of the Immigration Service for the State Department, that is, the request was made to the Public Health Service.

Q. Weren't you aware that Dr. Cameron specifically stated that he took two hundred blood tests for the Immigration Service? A. Well, I'm sure that Dr. Cam-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

eron, when receiving requests from the Immigration Service would not know whether the request emanated from the State Department or the Service.

Q. And as a matter of fact you do not actually know of those two hundred cases what cases or how many cases or what percentage was taken for the State Department? Do you? A. Except that because of the small number handled by Special Inquiry officers, I would assume that the vast proportion was taken for the State Department.

Q. You assume, but you have no definite knowledge? A. No, there are no statistics maintained whereby it could be broken down.

Q. So, you have no definite knowledge what proportion of cases were taken for the State Department and what by the Immigration Service? You say you assume? A. As I said, I assume and I think I have substantial reason to assume that the vast proportion were taken for the State Department.

Q. But nevertheless you are assuming? A. Yes.

Q. Now, are you aware that Dr. Sussman testified that he conducted three hundred blood test cases for the Immigration Service?

By Special Inquiry Officer: Might I interject at this point? It is well known that Dr. Sussman takes tests in visa petition cases and citizenship cases and we know that those blood tests are being taken all the time.

Attorney Gim to Special Inquiry Officer, (Interposing): But those are tests taken under the re-

Reopened Hearing Before Speciql Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

quest of the Immigration Service, is that not right?

Special Inquiry Officer to Attorney Gim: Well, the medical request, yes.

Attorney Gim to Special Inquiry Officer: Thank you.

Attorney Gim to Mr. Friedman:

Q. Now, you testified that there were four non-Chinese cases where the persons were not of the Chinese race but who were nevertheless subjected to a blood test. Is that correct? A. That is true.

Q. Now, do you know the exact date of the particular blood test? A. The two New York cases occurred approximately sometime in 1953 after these cases.

Q. When in 1953? A. I don't know the precise date. I knew but at the last hearing I wasn't asked and I have since forgotten.

Attorney Gim to Special Inquiry Officer: Mr. Chairman, since he has testified with regard to these files I ask for an opportunity to examine them.

Special Inquiry Officer to Attorney Gim: Your request is denied on the same grounds that your request for any files of the Immigration Service has been denied.

Attorney Gim to Mr. Friedman:

Q. Now, isn't it true that these four non-Chinese cases involved persons who are members of another minority,

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

namely, colored people? A. I don't know. I haven't the slightest idea of the race of the person. The file did not indicate it other than the fact that their names are not Chinese and I must assume that they are not Chinese persons.

Q. Would you state categorically that these cases do not involve colored persons? A. That, I do not know other than the fact that I have definitely ascertained that they are not Chinese.

OFF RECORD DISCUSSION

ON THE RECORD

By Special Inquiry Officer: We'll now recess for lunch.

RECESS

HEARING RESUMED

By Special Inquiry Officer: Although I do not ordinarily think it proper, I will in this case permit cross-examination by both counsel but I say that merely so that this should not be considered as a precedent in any other matter.

Attorney Ennis to Mr. Friedman:

Q. Mr. Friedman, do I understand the general purport of your testimony to have been this morning, where there are birth certificates and opportunity of the consul to

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

examine the circumstances at the place of birth, that ordinarily such cases wouldn't call for blood tests? A. Unless there be other factors in the case that do since I have already indicated there are numerous factors which can enter into the determination as to when a blood test is required.

Q. Could you suggest from your wealth of experience in this matter, what sort of a factor would suggest a blood test where you were satisfied on the documents and the opportunity to investigate? A. For example, one type of situation would be where there's no continuity of personal contact between the parents and the child.

Q. Are these all visa and citizenship petitions? A. Yes.

Attorney Ennis to Special Inquiry Officer: I would like to offer for the record a number of cases in which we have the Immigration file number in each case of either visa petition by a Chinese citizen for his alien immediate relative, or an application for a citizen relative in which there are both, the contemporaneous birth certificate records and the opportunity to investigate and yet in all of these cases blood tests were required.

Now, the form in which I have these are in letters from the attorneys handling these cases in which they state the facts of the case and the file number. I would like to suggest that these letters, stating the facts of these cases, be taken—subject however, to the Service's checking on the facts and adding in each of the cases any statement to the record that it thinks appropriate.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Special Inquiry Officer to Attorney Ennis: I'll take these documents in evidence for what they are worth, but I should point out that what causes suspicion in any individual's mind or any question in a person's mind, that person being either a consul or an Immigration officer, is difficult to fathom. In some cases it may be the way a man talks which leads him to believe that a man is a liar—he shakes before the person interviewing him or is very hesitant—, so as to give cause for suspicion as to his truthfullness. So that I could contemplate any number of little factors which might give a person the feeling,—well maybe he ought to test this case further by further investigation or by a blood test to satisfy himself that his suspicions perhaps are inaccurate. Also, the personal character of the individual, such as his known reputation for other criminal activities might lead to a suspicion about his statements. I offer these merely as illustrations of any number of possibilities that might arise, so that while I'll take these as evidence, I don't consider them very much frankly.

Attorney Ennis to Special Inquiry Officer: We would entirely agree with you if the charge was not racial discrimination, that the question of which criteria impelled the blood test in the particular case could not be persuasively determined, but that certain criteria were present—still suggesting no blood test,—still it was taken; but where the charge is racial discrimination and where all of the testi-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

mony has been that two very important factors or your contemporaneous birth records and your opportunity to investigate, we say that where even those factors are satisfied the practice of taking blood tests in Chinese cases is some support for the allegation and the charge of discrimination.

OFF RECORD DISCUSSION

ON THE RECORD

Special Inquiry Officer to Attorney Ennis: Insofar as the five documents which you have offered, I'll take four of them into evidence. I will not take the letter on the stationery of Jackson G. Cook as I find it has no substantial evidence or even a small amount of evidence to add to this case.

By Attorney Gim: I object.

Special Inquiry Officer to Attorney Gim: Your objection is overruled.

Special Inquiry Officer to Attorney Ennis: With relation to the other four which I will take into evidence, I make the same comment with regard to the letter of Hong & Gim re Chin Foon which I believe has no relation to this dispute and doesn't add anything to the record but being it's part of one letter it gets to be a part of the record, only because it's included in the document and not because I think it's appropriate.

Letter on the stationery of Irwin J. Cohen, dated November 23, 1954 is entered into evidence as Exhibit #27.

other hand, if the case were completely fraudulent it would be suspected that the testimony would be carefully coached and that no discrepancies would normally be developed. In cases where in substantial discrepancies in the testimony of the interested relatives are developed, it could mean that their testimony is false, that they are not related as claimed—or it could just as readily mean that the witnesses are giving honest testimony and that the variations are due to the normal lapses in memory as to details concerning family life and background. The difficulty of determining credibility under such circumstances has been tremendous and has imposed a major problem upon Immigration officers, including Special Inquiry officers. Ordinarily, credibility can be determined apart from precise answers given by the demeanor of a witness, by his hesitancy or forthrightness and by all the other usual factors which a tribunal can see and consider in determining credibility. But here again, the Chinese cases are somewhat unique, in that the testimony is almost invariably given through an interpreter. The officer who hears the testimony actually hears only the interpreter. It is extremely difficult to ascertain whether the answer was hesitant or immediate. It is extremely difficult to ascertain whether the witness stammered and hesitated in the course of his answer, only the interpreters' fluency is obvious to the tribunal. There-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

fore, the issue of credibility has been one extremely difficult to resolve,—particularly, in Chinese cases!

For this reason, when the use of blood tests on such issues first came to the attention of the Immigration authorities, it was seized upon as one of the first genuinely, tangible methods of reaching the truth. It is the position of the Immigration Service that the use of blood tests under such circumstances is not discriminatory—but is necessary, by reason of the pattern and type of case!—and not because the persons involved happen to be of the Chinese race.

Special Inquiry Officer to Mr. Friedman: Mr. Friedman, in your experience have you had occasion to discover the fact that there are what is popularly known as 'coaching books' used by applicants for admission to the United States?

By Mr. Friedman: We have come across that in any number of cases, particularly those in which frauds were discovered—and full confessions were made by the subjects thereafter that there is a standard practice, in bringing Chinese children to the United States—in having

Attorney Gim to Special Inquiry Officer, (Interposing): I object to this testimony.

By Mr. Friedman, (Continuing): Persons prepare what is known as a Halgoon, which is known as a coaching book. This book is an extensive, written summary of the entire background of a family with extremely detailed facts concerning the

family life, village, neighbors, schooling and geography of the area—which we have found and which aliens have conceded have been furnished to children for the purpose of memorizing stories so that when they reach the United States, they'll be in a position to consistently testify to the same extent as the father. The most recent case of this type is a case which reached the courts in New York, the *Yee* Case, wherein two boys who claimed to be brothers and the son of a citizen father—gave extensive testimony—running over many, many pages, completely consistent with each other and consistent with the testimony of their father. This case arose before—immediately before the blood tests were commenced to be used. The Immigration authorities, coincidentally—knew that the case was fraudulent from other sources. When the subjects were finally confronted with the additional evidence, they confessed that the boys were not the sons of their alleged father and were not even brothers to each other. The father in that case was subsequently indicted and absconded.

Attorney Gim to Special Inquiry Officer, (Interposing): I object to this testimony! It's not relevant,—it's based on hearsay!

Special Inquiry Officer to Attorney Gim: Insofar as "hearsay evidence" is concerned, as you know, that type of evidence is generally acceptable and I don't know if your classification of it as "hearsay" is completely correct, but even if it be so, it would be acceptable nevertheless.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Insofar as relevancy, I find that any of the background with relation to the examination of persons of Chinese descent entering the United States is of some interest in this matter and does have a bearing on the question of prejudice, because before one can determine prejudice—one must determine the reasons for certain actions, and this, I believe, is a part of the background which led up to the inception of the blood testing of Chinese persons.

By Mr. Friedman: I might also add that it has been found, again from experience, in any number of Chinese cases that it is the uniform practice for American fathers who return to China and have children never to disclose the fact that such a child died in childbirth or infancy, and that it is just as uniform to adopt or substitute another child with the hope of eventually bringing that child to the United States.

Special Inquiry Officer to Mr. Friedman: Have you personally observed or found cases in which admissions on convictions were obtained for such fraudulent acts?

Mr. Friedman to Special Inquiry Officer: Yes. I have personally reviewed many files in which such incidents occurred and it is again common knowledge to all investigators who have dealt with Chinese cases. I mention this only because it is important in considering the value of a birth certificate in such a case, and by that I mean, the ex-

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

istence of a birth certificate indicates of course, that a child by that name was undoubtedly born as stated in the certificate—but does not necessarily mean that the child who presents it is the one to whom it relates. Again, that can only be determined on a question of credibility or blood tests.

Special Inquiry Officer to Mr. Friedman: Do you have any observations on the fact that certain nationalities, including Chinese, who settle in the United States or who were citizens of the United States born abroad and who came here to live, then returned many times to their native place over a period of years without bringing their families to this country?

Mr. Friedman to Special Inquiry Officer: It has occurred from time to time but it is comparatively rare as compared to Chinese cases. In most European cases we have found that the father generally will bring the entire family to the United States as soon as he is economically able to do so.

Special Inquiry Officer to Mr. Friedman: On the question of fraudulently obtaining United States passports in this country, have you personally observed any great incidents in any particular group of persons?

Mr. Friedman to Special Inquiry Officer: Yes. As a matter of fact, I would venture to guess—that of several hundred passport fraud cases that I have personally seen or have known by reason of my own experience, the vast majority have been in

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Chinese cases. The most recent operation on a large scale, was one in Philadelphia in which I understand the United States Commissioner, who is a party to passport frauds, was also convicted. And all of those cases, a tremendous number, all involve Chinese applicants for passports in which the applications were fraudulently made.

OFF RECORD DISCUSSION.

ON THE RECORD

Special Inquiry Officer to Attorney Gim: You may question the witness if you wish, Mr. Gim.

Attorney Gim to Mr. Friedman:

Q. Now, you stated that most cases of Chinese applying for admission in this country, the vast majority,—the vast proportion of the Chinese were admitted. Is that right? A. That is correct.

Q. Now, did you ever cause a statistical tabulation of how many Chinese applied and how many were admitted and how many were rejected? A. No and I think that would be virtually impossible.

Q. But it's just you assuming, your impression—that the vast majority of Chinese were admitted. Is that right? A. My assumption is based on the fact that I have perused a substantial number of files and I assume that the proportion of those admitted and those that I have personally seen, would be roughly comparable to the proportion in a total number.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Q. This is an assumption of yours, it's not based on actual statistical tabulation, is it not? A. That is correct.

Q. So that your assumption could be wrong? A. That is right. I have made my assumption in very general terms without trying to quote precise statistics. For example, I have not said 51% or 60%—and for that reason, I think it is inconceivable that my assumption would be incorrect.

Q. But you say the vast proportion—you say the vast proportion without knowing how large the total proportion of those cases are. Isn't that right? A. When I said vast proportion I meant at least 50% and possibly as high as 75 or 80% or 90%.

Q. But you have no statistical data as to whether it's 45 or 30% do you? A. I would say that 30% is out of the question!

Q. But you have no statistical data to definitely indicate one way or the other. Do you?— No statistical data that you have maintained? A. No, that is correct.

Q. Thank you.

By Special Inquiry Officer: I think that I might add what is in the nature of evidence in this case on that particular point to add to the record. I maintain no statistical data either but my memory is pretty good.

By Attorney Gim: I object to your memory, but go ahead.

By Special Inquiry Officer: In the course of my work as Chairman of the Board of Special Inquiry

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

I worked with and even worked on examining Chinese persons on primary, as well as acting as Chairman of the Board of Special Inquiry and I know for the few years in which those matters came to my attention daily, and were a large part of my work, that the primary inspector and myself, when I acted as a primary inspector, admitted after the primary examination most of the applicants at the port of New York—during the period that I was so employed, to this country and that only a small portion of those persons were referred to the Board of Special Inquiry for further examination and hearing. And it has been my personal experience in handling cases of Chinese persons before Boards of Special Inquiry, that I, myself, after the Board hearing found that most of them were admissible, only a very small proportion of the entire total were found to be inadmissible—the largest proportion being passed on primary. To my experience of the small number referred to the Board, the largest portion of those being admitted after initial hearing and of those on which appeals were taken to the Board of Immigration Appeals from my decisions, many of those were finally admitted. So that the proportion finally excluded was small. But I think that those statistics, although no one has kept them,—but from memory alone, I don't believe they can be disputed.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

By Attorney Gim: I object to what the Hearing Officer said.

Special Inquiry Officer to Attorney Gim: Well, rather than include this all in my decision, I thought it well to put it on the record because I have a dual capacity and these things I know and I think ought to be made a part of the record.

Attorney Gim to Mr. Friedman:

Q. Mr. Friedman, you have testified that it was a uniform practice of the Chinese never to report a child who died and where the child has died to substitute another. Now, did you ever maintain any statistical data as to how many Chinese children die and how many substitutions there were? A. In the first place, there are always exceptions, I say it is common and frequent, almost invariably, but there are exceptions.

Q. I believe you used the word "uniform practice".

By Special Inquiry Officer: If he used the word "uniform practice" would you want to withdraw".

By Mr. Friedman: If I said "uniform" I should have said it is the "almost uniform practice" with exceptions of course.

Attorney Gim to Mr. Friedman:

Q. Now, in order to arrive in your mind whether or not such a practice is a uniform practice or an almost uniform practice, did you ever cause a statistical survey

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

to be made as to how many Chinese children died and how many Chinese children were substituted? A. No, I did not.

Q. Now, your opinion that this matter of substitution after the death of various children with other live children is a uniform practice is based on an assumption of your review of the records. Is that right? A. My review of the records and many, many hundreds of files and extensive discussions of these problems with investigators who have handled many thousands of similar cases.

Q. But it's not based on your own personal knowledge or your own personal investigation of the files? A. It is based on a large degree on my personal investigation and confirmed by the similar experiences of other officials who have had the same opportunity to conduct such investigations and examine files.

Q. But you haven't examined all the Chinese files have you? A. No one person could.

Q. And you haven't? A. I have not.

Q. Yet you will testify as to what the uniform practice is. Is that right? A. That is true.

Q. Now, since the day,—say August of 1952, when the Relators were blood tested, can you name me a single Chinese case, regardless of documents, where no blood test was required? Now, this is from your own knowledge! A. I have no knowledge at all on that line one way or the other.

Q. Thank you.

Attorney Gim to Special Inquiry Officer: That is all.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

OFF RECORD DISCUSSION

ON THE RECORD

Attorney Gim to Mr. Friedman:

Q. Mr. Friedman, can you cite me a single case since say August of 1952, when the blood tests were first begun, of a Chinese person applying for admission either on a non-quota visa or as a citizen who is not required to take a blood test? A. Perhaps I can answer that best by stating that I am not aware, nor have I any way of ascertaining how many cases there were and the identity of the particular cases since that time that meets the pattern which you have mentioned. In those cases that I did come across since that time which answers the description you have furnished and involve Chinese persons, blood tests were taken, now how many there might have been without blood tests or how many there might have been with blood tests,—that, I am not aware of. I haven't the slightest means or manner of ascertaining or knowing and I cannot speak more specifically than that.

Q. You don't know whether or not there was,—you don't know of any single Chinese case since August or July 1952, who was admitted without a blood test? A. If there was such a case I am not aware of it and I'd have no way of ascertaining whether or not there was such a case because no statistics along that line are maintained.

Q. But you don't know of the existence of any such case? A. No. I know of no existence of any such case

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

and I think if there were such a case it would be comparatively rare. I would concede that—in other words, it certainly would not be the common situation. I think it would be more common since August '52 to use blood tests.

Q. That's as far as we'll go with that.

Special Inquiry Officer to Mr. Friedman, (Interposing): Mr. Friedman, I gather that you might not know this, but, have you heard anything with regard to what the State Department does with regard to applications made to it? Do they now universally test the blood of Chinese applicants in Hong Kong where that might reveal something of interest to them?

Mr. Friedman to Special Inquiry Officer: I have no way of knowing whether the State Department has made its blood testing practice universal or whether the State Department confines it only to cases where it is felt necessary from the particular facts. But I would again assume from the records and files that I have seen that it's extremely common and certainly used in the vast proportion of cases by the State Department, if not all.

Off Record Discussion

On the Record

Special Inquiry Officer to Attorney Gim:

Q. Is there anything further before this hearing is closed? A. Nothing further.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

By Special Inquiry Officer: I'll not at this time make my decision, because first of all I want to examine again the instructions regarding Chinese persons in visa petitions and citizenship cases which have been referred to in this hearing so that I'll be able to comment in my decision regarding that. I also will look at the files referred to as Exhibits 27 through 30 and I may or may not comment on that in my decision, depending upon whether anything important is discovered by my examination which might lend a little more light to the statements set forth in those exhibits, and I should also like to consider the testimony given today at greater length, after which I will render my decision and it will be served upon you in writing and you will, of course, if it is unfavorable, be afforded the right to an appeal therefrom to the Board of Immigration Appeals in Washington, D. C. You know the procedures.

Attorney Gim to Special Inquiry Officer: Yes. May I have a copy of the record made today?

Special Inquiry Officer to Attorney Gim: That will be served upon you with the decision.

By Special Inquiry Officer:

RECORD CLOSED

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dinlock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674.

I CERTIFY the foregoing to be a true and correct transcript of my shorthand notes of the testimony taken by me in the above case.

MAGNETIC LOVE
Magnetic Love
Reporter.

I CERTIFY that to the best of my knowledge and belief, this record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record.

AARON I. MALTIN
Aaron I. Maltin
Special Inquiry Officer

AIM:ml

Decision of Special Inquiry Officer, Dated January 18, 1955

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
70 COLUMBUS AVENUE, NEW YORK 23, N. Y.

Jan 18 1955

Files: 0300-423253—New York
0300-423254
0300-423255

In re: LEE KUM HOY
and
LEE KUM CHERK
and
LEE MOON WAH

IN EXCLUSION PROCEEDINGS

IN BEHALF OF APPLICANTS: Benjamin Gim (Of Counsel)
Hong & Gim
551 Fifth Avenue
New York, N. Y.
(Representing Lee Kum Hoy and Lee Kum Cherk)

and

Edward J. Ennis
165 Broadway
New York City
(Representing Lee Moon Wah)

EXCLUDABLE: Act of 1924—no immigration visas—
Executive Order 8766—no passport

Decision of Special Inquiry Officer, Dated January 18, 1955

APPLICATIONS: Admission as United States citizen under Section 1993, revised statute (Lee Kum Hoy)
Admission as United States citizens under Section 201 h & g of the Nationality Act of 1940 (Lee Kum Cherk & Lee Moon Wah)

DETENTION STATUS: Released on $1000 bond each.

DISCUSSION: This case has been previously heard and decisions made on a number of occasions. I hereby incorporate by reference all previous decisions. All of the issues have been settled except one. By order of Judge Dimock made in the Southern District Court on October 4, 1954, in conformity with his decision of August 31, 1954, it was directed that a writ be sustained unless a hearing was held to determine whether or not these applicants were discriminated against in their applications for admission to the United States. This is the only question to be reconsidered in this decision. The decision, therefore, will concern itself solely with that issue, and with the evidence offered on that issue.

Two hearings were held, one on October 28, 1954, and another on December 10, 1954, and the testimony in those hearings consisted of statements under oath by Lester Friedman, an official of the Immigration Service, with regard to his knowledge of the customs, practice, rules and procedures of the Immigration Service with regard to this case and others similar to it. Counsel for the applicants also offered some documentary evidence.

For the applicants to prove that there has been discrimination in so far as they are concerned they must show that

that discrimination existed in the primary application which they made for admission to the United States and their examination thereunder and in their hearing before a Board of Special Inquiry to which they were thereafter referred. The applicants arrived in the United States on June 17, 1952. They were referred to a Board of Special Inquiry on July 22, 1952. Hearings were actually held on August 14 and September 18, 1952, at which time a decision was made by the Board of Special Inquiry excluding them from admission to the United States. An appeal was taken from that decision, which was affirmed by the Board of Immigration Appeals on May 11, 1953. On consideration of the relevant dates of action in this case and the testimony of Lester Friedman, it appears clear to me that discrimination must be established to have existed in 1952 if it can be established at all. All of the actions after 1952 upon appeal, reopenings, writs in courts, etc., were merely on questions of law and fact which have no direct bearing upon whether discrimination existed in the exclusion of these applicants from admission to the United States. Therefore it is clear that discrimination if it is to be established must be established to have existed in 1952.

The Immigration Official who testified as to his knowledge of the Immigration Services' procedures, policies, rules and regulations is a person well qualified to speak upon the subject. The port of New York is the most active port of entry in the United States. I do not think it can be disputed that New York is the largest port of entry for all aliens, including persons of Chinese descent arriving from China. Whatever takes place in New York is therefore representative of the actions of the Immigration Service.

While the testimony of Mr. Friedman, I believe, remains uncontroverted in any important particular, it might be

well to indicate that I from my personal experience as an Officer of this Service and in the positions which I have had might be able to add my affirmation to many of the things he testified to. This is in no way to be construed as an indication that the testimony of Mr. Friedman needs confirmation in any particular. I occupy a dual position in this hearing, that of developing the facts both for and against the applicants, and my decision must be based solely on the record, whether it be for or against the applicants. However, I cannot help but consider some facts which are known to me personally to be so. I therefore reiterate that in broad outlines as Mr. Friedman has testified I from my personal experience can say that there is nothing that need be added to arrive at a decision in this case. And I can also say that I found no particular in which I wished to contradict Mr. Friedman as to his knowledge of the rules, practices and procedures of this Service because if there were any facts known to me which were at variance with his testimony I would have elicited them from him or made them a part of the record on my own.

This Service first became aware of the technique of blood testing after it was instituted by the State Department in its Hong Kong Consulate. The State Department called upon the Immigration Service to assist it in many cases by requesting persons living in the City of New York to appear for blood tests which were to be transmitted to their office. This was some time in 1952. The applicants themselves, through counsel, have offered as an exhibit a document of the Public Health Service dated May 8, 1952, which was marked Exhibit #23, and which states in part, "The Immigration and Naturalization Service has received a request from the American Consul in Hong Kong for the

blood typing of United States citizens of Chinese descent who are claimed as parents by foreign born applicants for United States passports." This letter goes on to say what the Public Health Service will do in this regard. It can thus be seen that the initial program of blood testing was initiated in the State Department through its Consul in Hong Kong. When this fact came to the attention of the individual Primary Inspectors and the individual Chairmen of Boards of Special Inquiry in the port of New York it was apparently deemed a worthwhile procedure in difficult cases which could not be settled easily on the fact before them, to resort to the same blood testing device to aid in arriving at a decision. There was no directive or policy established in 1952 to have this done of any group or of all persons, or even one person. The Chairmen of the Boards of Special Inquiry at the port of New York were not directed by any of their superiors to do this. It was apparent an independent action of their own which they took to assist them in arriving at the appropriate decision. As more and more requests came in from the State Department to conduct blood tests for the Hong Kong Consulate the facts became more widely known to all officials of the Immigration Service as well as to the Chairmen of the Boards of Special Inquiry.

The applicants contend that the actions of the State Department can be imputed to the Immigration Service. It must be stated at this point that there is a relationship in some cases between the activities of the Immigration Service and the State Department. Persons filing visa petitions for instance, for the issuance of visas for their wives and children abroad preliminarily must apply to the Immigration Service. The applicants must apply directly to the State Department abroad. Therefore, a cooperation

between the two agencies is inevitable, but I do not think that this is sufficient to reach the conclusion which the applicants wish to press, that the actions of the State Department shall be imputed to the Immigration Service.

The question of blood testing in an exclusion case was litigated actively and the Board of Immigration Appeals in a decision dated February 25, 1953, in the case of Lee Fay Fan finally established that blood testing was proper and that the results of it could be used in deciding the admissibility of applicants for admission to the United States. The decision by the Board of Immigration Appeals in the instant case on May 11, 1953, is based upon that decision. After the Board of Immigration Appeals, which is the highest appellate jurisdiction for the Immigration Service, administratively had decided the *Lee Fay Fan* case, the Immigration Service decided to issue instructions with regard to the matter of blood testing, and it did issue in *1953* some instructions to its employees in the field in writing with regard to visa petition cases and to persons applying for certificates of derivative citizenship. *No instructions* were ever promulgated with regard to the use of these procedures in *Exclusion Hearings.*

As a matter of fact the State Department has now adopted a different procedure in its handling of this type of case and they will not issue any documents until the matter is fully settled. Previously the State Department had been issuing temporary travel documents to persons claiming United States citizenship and many major issues had to be settled by the Immigration Service upon their arrival in this country. Now it is the practice to issue regular passports to citizens and after that, upon their arrival in the United States, these may be accepted by the Immigration

Service as fully authentic and proper documents without further question.

Mr. Friedman declined in the course of his testimony to reveal the contents of certain confidential instructions from the Central Office of the Immigration Service. At the request of counsel in these proceedings I examined the instructions alluded to by Mr. Friedman and found that he could not, if he was to maintain the confidential nature of these communications reveal any of the exact wording or portions thereof. It would not only be improper but would make no sense unless the entire context was revealed. His testimony, however, is unequivocal and supported by my personal examination of those instructions, that there are no formal written instructions in any cases other than visa petition cases and derivative citizenship cases, and further, that these instructions were issued in 1953 after the Lee Fan Fay decision of February 5, 1953. As a matter of fact the *Lee Fan Fay* case is specifically referred to in those instructions as the authority for the procedures set forth. More recently the instructions in these two types of cases have been amended to eliminate any group specification. I might also add at this point that there are no instructions to this date with regard to exclusion cases.

To summarize, then, it is clear that the use of blood tests in certain cases appearing before Boards of Special Inquiry in the port of New York in 1952 as this one, was an idea of the individual officers involved. The thought for it came from their knowledge that the State Department was using blood testing and their consideration that such a test might be practically valuable in

arriving at their decision. The most that might possibly be said is that the Immigration Service adopted a somewhat different procedure for persons of Chinese descent seeking admission to the United States. It may possibly be so in its inception. The use of different procedures are occasioned by facts unique in and of themselves. There can be no doubt that if the Immigration Service found it useful and feasible, as it has in some other cases, to use this procedure, it will do so and has done so. The enforcement of the law within lawful means is incumbent upon persons working for the Immigration Service. It would be dereliction of duty if they failed to make use of a known method for detecting fraud because they had not used the same method for every alien seeking admission to the United States. Blood testing for persons seeking admission to the United States is an expensive, difficult and time consuming project not lightly to be entered into by any Government Agency. To use it to test the blood of each child seeking admission to the United States as the son of an American citizen would be a gigantic project. It might very well produce results if used universally throughout the world and for every child seeking admission to the United States in that capacity. There are undoubtedly some frauds committed by the substitution of persons in other parts of the world besides China. There are undoubtedly cases in which children are substituted by wives living abroad separated from their husbands for many years for one reason or another which might be discovered in this manner. However, to undertake such a vast project with the prospect of detecting an infinitesimal fraction of those persons would hardly be practical. From long experience though, in dealing with persons of Chinese

descent, it has been found that fraud has been practiced and that it is widespread. Therefore it has been found worthwhile by the State Department to adopt an almost uniform practice of blood testing. This Service has used it in some cases. In other words, the results justify the effort. To say that this constitutes discrimination has no foundation. It is merely, and at the most, a different procedure adopted for a difficult and special situation which the Immigration Service has had no hesitancy in using in any case where found worthwhile.

When a new procedure is adopted it arises or is invented because of a problem or a situation which exists. Once it is tested and used at the point where the inventor first started to use it and it is found acceptable, word of its efficacy spreads. This is so in industry, administration and in enforcement of law. An idea which is translated into a policy or procedure starts somewhere. In this case we believe we know where it started. It was found useful and helpful and then its use spreads. It spread from the State Department to this Service. It has spread and will spread further from its usage in the cases of certain applicants to a widespread and perhaps universal use if found beneficial. To say that because it was not immediately adopted in every case and everywhere constitutes discrimination is, I believe, a false premise. Only when something has proved itself does its adoption as a universal measure take place. The proving ground for the use of blood tests was the American Consulate in Hong Kong. Whether the State Department makes use of this procedure elsewhere I do not know. It has spread from the State Department to this Service which has used it unquestionably, mainly in cases of Chinese persons, but not exclusively. However,

the Immigration Service does not restrict itself in using any procedure to enforce the law against any person who is suspected of using fraud. It has been used in other cases where found needed and proper and it will be used again wherever found proper. There is certainly no prohibition against its use in any type of case and an Immigration Officer would be derelict in his duty were he not to use any known procedure to detect a fraud. No instructions need be given to Immigration employees on matters of this sort except as to the formal methods of carrying it out. I therefore find specifically, that there was no discrimination at the time these applicants sought admission to the United States in 1952. Whether it can be claimed by the applicants that after rules and regulations were promulgated in 1953 with regard matters such as visa petitions and derivative citizenship cases that discrimination existed in those matters is not a question to be decided at this hearing. On the facts before me and on this matter alone it is adequately established that no discrimination existed or has existed in any exclusion proceeding. I therefore affirm the last order of the Board of Immigration Appeals dated June 17, 1954, in this case and the findings of fact and conclusions of law set forth therein. For purposes of clarity I enter the following order:

ORDER: It is ordered that the applicants be excluded from the United States.

AARON I. MALTIN
Aaron I. Maltin
Special Inquiry Officer

AIM/rwl

Decision of Board of Immigration Appeals, Dated May 5, 1955, Dismissing Appeal

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

May 5—1955.

Files: 0300-423253—New York
0300-423254
0300-423255

In re: LEE KUM HOY, LEE KUM CHERK and LEE MOON WAH

IN EXCLUSION PROCEEDINGS

IN BEHALF OF APPLICANTS: Benjamin Gim (Of Counsel)
Hong & Gim
551 Fifth Avenue
New York, New York
(Representing Lee Kum Hoy and Lee Kum Cherk)

and

Edward J. Ennis, Esquire
165 Broadway
New York, New York
(Representing Lee Moon Wah)

EXCLUDABLE: Act of 1924—No immigration visas
E. O. 8766—No passport

APPLICATIONS: Admission as United States citizen under Section 1993, Revised Statutes (Lee Kum Hoy)

Decision of Board of Immigration Appeals, Dated May 5, 1955, Dismissing Appeal

Admission as United States citizens under Section 201(h) & (g) of the Nationality Act of 1940 (Lee Kum Cherk and Lee Moon Wah)

DETENTION STATUS: Released on $1000 bond each

This case has been before this Board twice previously. On May 11, 1953 and on June 17, 1954 we ordered that the appeals be dismissed. The case comes before us now on the limited issue described by Judge Dimock on August 31, 1954, "whether or not the requirement of blood tests in the case of Chinese applicants amounts to unconstitutional discrimination". In that decision, 123 F. Supp. 674 (D.C. N. Y., 1954), after finding (1) that blood tests, properly taken, can absolutely exclude the possibility of paternity in certain cases, and (2) that an applicant's refusal to submit to a blood test raises the logical inference that he knows that paternity does not exist and fears that its nonexistence may be disclosed by the tests, and (3) rejecting the claim that the immigration authorities cannot require submission to a blood test as a condition to finding American citizenship, the court held, "relators were denied due process of law by the special inquiry officer's ruling on the hearing that the immigration department's policy had no bearing on the case and by the Board of Immigration Appeals ruling that the issue of racial discrimination was not proper (intended to be "properly" in our decision) in the case". The court ordered that the writ of habeas corpus be sustained unless within 20 days the hearing before the board of special inquiry be reopened for the purposes of (a) the introduction of evidence with respect to the requirement of blood

grouping tests in the cases of persons of the Chinese race and the omission to require blood grouping tests under similar circumstances in the cases of persons of other races, and (b) the determination, upon such evidence, of the issue of discrimination.

Since the decision of Judge Dimock on August 31, 1954, there have been two decisions by the Circuit Court of Appeals in New York in cases involving blood testing of Chinese applicants for admission to the United States, which, we believe, dispose of the issue of racial discrimination in these tests. *Lue Chow Kon, et al* v. *Brownell,* 220 F. 2d. 187 (C. A. 2, 1955) and *Dong Wing Ott and Dong Wing Han* v. *Shaughnessy,* 220 F. 2d 537 (C. A. 2, 1955). In the former case the trial judge dismissed a declaratory judgment action brought on behalf of three seeking judgments of United States nationality and citizenship, claiming to be sons of a United States citizen. The trial court held that the appellant's testimony was not credible and that they had failed to sustain the burden of proof. 122 F. Supp. 370 (D. C. N. Y., 1954). The Circuit Court of Appeals held that the dismissal of the action was correct.

In addition to the appellants' failure to sustain the burden of proof, there was affirmative evidence, testimony of an expert, that on the basis of blood grouping tests one of the three claimed sons could not be the child of the alleged father. The Circuit Court of Appeals said:

> It does not appear that Judge Kaufman held the tests in themselves to be conclusive, although he might properly have so held under New York law. *Tyler* v. *Costonie;* 97 N. Y. S. 2d 804; *Fowler* v.

Decision of Board of Immigration Appeals, Dated May 5, 1955, Dismissing Appeal

> *Rizzuto*, 121 N. Y. S. 2d. 666 and 1 Wigmore, Evidence, Section 165(a). Appellants also raised the question of constitutionality of application of the tests only to Chinese. . . . Even if that were established, it would not in itself show that the discrimination was based on race or color. The conditions in China during the period in question posed such great obstacles to investigation by ordinary means into family history and evidence of parentage that resort to the tests to aid in determination of parentage or non-parentage of persons from the area is an entirely reasonable requirement.

The court also held that blood test evidence is admissible under the New York Civil Practice Act, Section 306(a) if such tests prove non-paternity or, alternatively, citing *Beech* v. *Beech*, 114 F. 2d. 479 (D. C., Cir.) that the evidence is admissible under Rule 35 of the Federal Rules of Civil procedure.

In the second decision of the same court, *U. S. ex rel. Dong Wing Ott* and *Dong Wing Han* v. *Shaughnessy*, *supra*, the court detailed the long history of litigation before the boards of special inquiry, Board of Immigration Appeals and the U. S. District Court of New York. The writs of habeas corpus had been dismissed by the U. S. District Court of the District of New York. The court disposed of several grounds of appeal, including the claim that the tests are racially discriminatory in much the same words as used in *Lue Chow Kon* v. *Brownell*, *supra*, stating that the requiring of blood tests of applicants born in China during the period in question is justified by the "unusual circumstances". These circum-

stances are described by the court as "lack of reliable written governmental records of birth and parentage, difficulty of access to the areas from which the claimed family groups come, and long absences from the family group of the citizen father who is an identifying witness". The court declared that these circumstances justify the requirement of additional evidence, and the distinction is, therefore, "one not based on race or color".

On the strength of the two Circuit Court decisions cited above we hold that the blood tests when used as they were used in the instant case, with the necessary safeguards and for the purposes and with the justification with which they were used, are not racially discriminatory. However, because the reopend hearings were held as directed by Judge Dimock, and because a limited amount of information was made available in that record we will consider the hearings.

The reopened hearing was held, and an attorney for the Immigration Service testified at length upon the history, development and use of blood testing techniques in the Immigration Service. The special inquiry officer also made a number of statements relying on his experience and recollection and read into the record several short factual synopses of cases of record which had been requested for perusal by counsel.

Counsel for appellants sought through statistical theorizing to prove racial discrimination. He requested large amounts of statistical data with respect to the ratio between the numbers of Chinese cases handled by the Immigration Service since 1952 and the number of non-Chinese cases handled, to be compared with the ratio

Decision of Board of Immigration Appeals, Dated May 5, 1955, Dismissing Appeal

between the number of cases in which blood tests of applicants and their alleged parents had been made in Chinese cases, as opposed to the number of non-Chinese cases in which blood tests have been performed. The special inquiry officer stated that there is no such statistical data in existence and that to prepare such data would necessitate a review of practically all immigration cases handled by this Government since 1952, because cases are not kept by name, nationality, or subject matter, but are filed by the Immigration and Naturalization Service only by number.

Counsel also requested that he be furnished a number of specifically named and identified immigration records. It was his intention, apparently, to demonstrate with facts obtained from these records that, first, blood tests have been used almost exclusively in cases involving applicants of Chinese descent and, second, that blood tests have been required in a number of cases, even though the persons of Chinese descent were in possession of birth certificates and other documentary evidence, and came from an area in China where it is still possible for the United States Consul to conduct an investigation for the purpose of ascertaining the truth of the applicants' claims. This area referred to the city of Hong Kong.

Counsel's request for extensive immigration records was properly denied. It has been the attitude of this Government that all immigration records must necessarily remain confidential, because they contain large quantities of personal information. Making such records available to even a few outside persons and even for limited purposes, would obviously be unfair to the persons whose

records were released. It was proper for the special inquiry officer to refuse to permit counsel to search files which have no relation to the present matter.

Further, the amount of data available on this subject to the government and to counsel, even if the Service attempted to cooperate in making such studies, is inadequate at this time to permit drawing any persuasive conclusions. It seems to us that conclusions would have to rest, not on the numbers of all kinds of cases, but on the number of derivative citizenship cases involving disputed paternity arising during the control period concerning Chinese persons, as distinguished from those involving non-Chinese persons. If most of such cases concern Chinese persons, naturally blood tests would usually concern Chinese persons. Objective controls of such a study would be almost impossible.[1] A limited number of cases, haphazardly selected, and analyzed by either party or by us, does not constitute a basis for drawing any persuasive conclusions. The use of blood tests was commenced in immigration proceedings concerning Chinese applicants, not as a matter of racial discrimination, but as the result of a tremendous need. In 1949 and 1950 twelve United States Consulates in China were closed, leaving open only the Consulate at Tai Pei, Formosa[2] and that at Hong Kong which is

---

[1] For a study concerning the techniques of producing reliable statistical data for evidentiary use see *Sampling to Produce Evidence on which Courts will Rely*—by Joel Dean Associates and Col. University, Current Business Studies, Oct., 1954 (reprints available from J. Dean Associates, 49 Windsor Terrace, Yonkers 3, New York.)

[2] We are not informed as to whether blood testing is being done on Formosa. No cases involving blood testing have come to us from that area.

not considered by the Department of State to be part of China. All persons seeking documentation for the United States were required to be processed at those two centers. Applicants from all over China decended upon the Hong Kong Consulate claiming to be sons of United States citizens, most of them inadequately documented, and most of them from the interior of that great country. The problem of checking the thousands of claims for authenticity seemed almost unsolvable. Government witnesses testified that the use of blood tests in this emergency by the State Department came to the attention of the immigration authorities in this country when the United States Consul at Hong Kong asked the Immigration Service for assistance in securing information regarding blood grouping of persons living in this country and seeking to bring alleged offspring to the United States. The Immigration Service then adopted the method for use in some of its proceedings.

The use of a new scientific device must begin somewhere. The fact that blood tests have been used primarily in cases involving applicants of Chinese descent does not mean that the use of such tests in the future will be limited to such persons. Occasionally cases involving persons of other descent come to our attention where there is a question of parentage, and the proof of the relationship is inadequate. Since blood testing has become more widely known to Immigration and State Department personnel we have no doubt that the tests will prove valuable in non-Chinese cases as well. Before blood tests might be used universally in immigration work to assist in the detection of imposition it was necessary to secure their acceptance by the courts. This Board did

not accept blood test results as conclusive until our decision in *Matter of L— F— F—*, Int. Dec. 430, February 25, 1953. That exclusion was not appealed, so far as we know.

Counsel argues that persons coming from Hong Kong, where birth records may be maintained, and where consular investigations are still possible should be relieved of the necessity of taking blood tests. The argument is not relevant to the present case, because these appellants did not come from Hong Kong and were not properly documented. Furthermore, a rule based purely on geographical considerations, that persons coming from Hong Kong should not take blood tests but persons coming from other parts of China should be required to take such tests, would not seem fair and reasonable.

In *Mar Gong* v. *Brownell*, 109 F. Supp. 821 (December 15, 1952) the trial judge discussed the pattern of Chinese citizenship cases as he and other judges in the District of California had seen them over a period of years. The Circuit Court of Appeals, 209 F. 2d. 448 (C. A. 9, 1954) criticized this treatment of the case, stating that the court's findings were "based in part upon the circumstances shown in these other cases", and concluded, "We think that the court here should not have given weight to its experiences, unfortunate as they may have been, in other cases, in arriving at its findings with respect to this appellant. Each case should be allowed to stand upon its own bottom." Similarly, on the issue of racial discrimination, we believe the instant case should be required to stand upon its own bottom, not on a study of other cases which may or may not be similar.

Decision of Board of Immigration Appeals, Dated May 5, 1955, Dismissing Appeal

The instant case is much the same as *Lue Chow Kon, et al.* v. *Brownell* and *Dong Wing Ott et al.* v. *Shaughnessy, supra.* There is here an absence of convincing family history data, an absence of reliable birth records maintained by a responsible governmental authority, and lack of access for investigation to the geographical area of origin of the family. Under these circumstances, there was no racial discrimination practiced by requiring blood tests of these appellants. If it is alleged that racial discrimination was practiced by the requirement of blood tests in other cases, we will have to decide those cases on their own facts as they come before us.

We affirm our previous conclusion that the appellants have not sustained the burden of proving the claimed relationship to the alleged father. They have had ample opportunity to meet the unfavorable evidence and have not done so. They have been granted due process, and the hearings have been conducted in accordance with the applicable law and regulations.

ORDER: It is ordered that the appeal be dismissed.

THOS. S. FINUCANE
Chairman

[fol. 402] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

October Term, 1955

Docket No. 23972

UNITED STATES OF AMERICA, ex rel. LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH, Appellees,

v.

JOHN L. MURFF District Director of Immigration and Naturalization, Appellant.

Edward J. Ennis, Attorney for Appellee, Lee Moon Wah, 165 Broadway, New York 6, N. Y.

Ben Gim, Attorney for Appellees, Lee Kum Hoy and Lee Kum Cherk, 24 Pell Street, New York 13, N. Y.

Clifford Forster, Of Counsel.

[fol. 402a] **APPENDIX TO APPELLEES' BRIEF —Filed May 7, 1956**

EXHIBIT 27

BEFORE THE BOARD OF IMMIGRATION APPEALS

IRWIN J. COHEN
ATTORNEY AT LAW
185 WORTH STREET
NEW YORK 13, N. Y.

BARCLAY 7-0058-9

CABLE ADDRESS:
"NYCCHONG"

November 23, 1954

Mr. Ben Gim
551 Fifth Avenue
New York 17, New York

Dear Mr. Gim:

You have asked whether I have ever handled a case of an American citizen of Chinese descent, seeking to bring his

child to the United States as a citizen, having documentary evidence in the form of birth certificates and the like to prove the relationship of father and child, and where inspite of such evidence, a blood test was required. I have a case involving the following facts:

L-- H--, being an American citizen of Chinese descent initiated proceedings to bring his son, L-- L--, over to the United States as an American citizen. L-- H-- submitted an official birth certificate No. 18391 issued by the British Registrar General at Hongkong showing that L-- L-- was born on November 18, 1950 at Hongkong.

In addition, L-- H-- submitted a marriage certificate No. 1131 issued by the Registrar of Marriages at Hongkong [fol. 403a] showing that he was married to L-- Y-- C--, the mother of L-- L--. In addition, L-- H-- submitted numerous photographs showing father and child, mother and child, father, mother and child, including some at about the time of birth, and wedding pictures of the parents.

In this case, although the child was only 1½ years of age at the time, he was given a blood test. The father, L-- H-- was requested by the Immigration Service by letter on July 24, 1952 (0300-423544) to report for a blood test.

An action for declaratory judgment on this case finally resulted in the admission of the child to the United States.

It is my belief that the blood test was unnecessary here in view of the abundance of official documentary evidence, the photographic evidence, and the feasibility of a thorough investigation by the American Consul, since the child was born and living in Hongkong together with his mother.

Very truly yours,

(Signed) IRWIN J. COHEN

IRWIN J. COHEN

[fol. 404a] EXHIBIT 28

BEFORE THE BOARD OF IMMIGRATION APPEALS

DAVID KAUFMAN
ATTORNEY AT LAW

TELEPHONE
WALKER 5-4567

401 BROADWAY
NEW YORK 13, N. Y.

November 26, 1954

Ben Gim, Esq.,
551 Fifth Avenue,
New York City, New York.

Dear Mr. Gim:

This refers to your recent inquiry as to whether I have ever handled a case involving Chinese persons, seeking admission either as non-quota immigrants or as foreign born American citizens by virtue of being children of an American, being required to take a blood test, although having strong documentary evidence of their claim in the nature of birth certificates, marriage certificates, and the like. I have a case involving these facts which may be of interest to you.

In the Matter of Ng Ho Gim, VP3-53977 the father being an American citizen of Chinese descent, petitioned for his son, who is now six years of age. The petitioner submitted in proof of his claim a Registry of Birth No. 62013 issued by the British Government at Hong Kong, and an official Report of Birth of Child Born Abroad of American Parent (State Department Foreign Service Form 240) which recited that the son was born at Kowloon, Hongkong on February 4, 1948 and that the Petitioner' and his wife's marriage was [fol. 405a] evidenced by a "Chinese Marriage Certificate issued to NG Ho Gim and Mak Che-Noon on June 25, 1948 and counter-sealed by the Chinese Ministry of Foreign Affairs at Canton, China". This form was signed by James W. Anderson, Vice Consul of Hongkong. Although this evidence was submitted, the peti

tioner was requested by the Immigration Service by letter dated June 2, 1954 (File 0300-466643) to report for a blood test.

It is my belief that the blood tests were unnecessary in this case to resolve the issue of paternity since the official documents issued both by the British, Chinese, and United States Governments clearly proved the relationship of parent and son in this case, in addition to the fact that the residence of the parties in Hong Kong made an investigation by the American Consul feasible.

Yours truly,

(Signed) DAVID KAUFMAN

DK/a

[fol. 406a] EXHIBIT 29

BEFORE THE BOARD OF IMMIGRATION APPEALS

LAW OFFICES
ANDREW REINER
320 BROADWAY
NEW YORK 7, N. Y.

ANDREW REINER
IRVING RADER

CABLE ADRESS:
ANDRIGRAM, NEW YORK
BARCLAY 7 - 6078
6079

November 24, 1954

Benjamin Gim, Esq.
551 Fifth Avenue
New York 17, N. Y.

Dear Mr. Gim:

You have recently asked whether I have ever handled any case wherein an American citizen of Chinese descent, petitioning for his child's admission as a non-quota immigrant, who having official documentary evidence of his marriage and the birth of his child, was nevertheless required

to submit both himself, his wife, and child to a blood test. I have a case in this category which was recently processed by the Immigration Service.

Kai Young Lau, a Chinese alien residing in the United States, went to Hong Kong in or about 1948 or 1949. There he married Au Kit Fong, a Chinese woman, in accordance with the British Civil Law. He obtained a marriage certificate from the Registrar of Marriages, which is an office maintained by the British government, showing the date of marriage, place of marriage, the names, surnames, ages, and residences of the respective parties.

[fol. 407a] When Lau Kwok Kong, his son, was born, Kai Young Lau, the Chinese alien had his child's birth also registered with the office of the British-maintained Registrar of Births and Deaths. An official birth certificate was then issued certifying to the date of birth and the name of the child, the names and surnames of his father, the name and maiden name of his mother, and the address in Hong Kong where the birth took place.

Kai Young Lau, the Chinese alien then returned to this country, leaving his wife and child in Hong Kong. Shortly afterwards, he was naturalized as an American citizen, and he then petitioned the Immigration Service for the approval of a visa for his wife and child as non quota immigrants.

Sometime after the filing of the petition, Kai Young Lau was requested by letter to appear at the Immigration Office. When he appeared, he was told to go with an Immigration Inspector for a blood test. The child being at that time about four years old and the mother over in Hong Kong were also subjected to a blood test. (File Numbers - A 5391427, VP 3-17408 and VP 3-17409)

Even before the petition was filed Kai Young Lau had an I-475 application and affidavits of support on file at the Consulate and the Consul was for a long time cognizant of the family relationship existing between these parties.

It is my belief that in view of the official documentary evidence of marriage in the form of a marriage certificate, and the evidence of relationship of parent-child, as shown by the official birth certificate, together with the feasibility of a thorough investigation by the American Consul as to the facts and circumstances surrounding the birth, (since

[fol. 408a] the marriage and subsequent birth took place in Hong Kong and the parties lived there), there was no necessity for a blood test in this case.

Very truly yours,

(Signed) ANDREW REINER
Andrew Reiner

AR:MT

[fol. 409a] EXHIBIT 30

BEFORE THE BOARD OF IMMIGRATION APPEALS

HONG & GIM
ATTORNEYS AT LAW
551 FIFTH AVENUE
NEW YORK 17, N. Y.

EDWARD HONG
BENJAMIN GIM

MURRAY HILL 7 - {8596 / 8597

STATEMENT

The undersigned submits this statement for the purpose of furnishing information to the Special Inquiry Officer in connection with the reopened hearing of Lee Kum Hoy, et al. concerning the practices and procedures of the Immigration Service in the matter of blood tests. I am reciting the pertinent facts in two cases bearing upon this subject.

Goon Heu Man, files 0300-449645, VP 3 8290

Goon Lun Poy a citizen of the United States of Chinese descent petitioned the Immigration Service for the admission of his wife and also requested a passport for his son, Goon Heu Man, who was a citizen born abroad of an American parent.

In support of his applications, Goon Lun Poy, produced his certificate of identity issued by the Immigration Service which recited that he was admitted as a citizen of the United States on October 19, 1922. His citizenship was sub-

sequently confirmed by the State Department in twice issuing passports to him to travel abroad.

To support his claim of a lawful marriage to his wife, Shiu Yue Yuk, he produced a marriage certificate No. 10505 issued by the Registrar of Marriages of the British Civil [fol. 410a] Government at Hong Kong. Said marriage certificate recited that Goon Lun Poy was married to Shiu Yue Yuk in the office of the British Registrar at Hong Kong on December 8, 1951, and gave the names of the witnesses to the marriage and their signatures, the names of the fathers of both parties, and their addresses.

To support his claim of relationship to his son, Goon Heu Man, Goon Lun Poy submitted a contemporaneous birth certificate No. 226541 issued by the Registrar of Births and Deaths of the British Civil Government in the Crown Colony of Hong Kong. Said birth certificate stated that Goon Heu Man was born on November 18, 1952 at 119 Cheung Sha Wan Road, Hong Kong, and that his parents were Goon Lun Poy and Shiu Yue Yuk.

In addition to the above proofs, Goon Lun Poy submitted group photographs including a wedding day picture of himself and his wife, and pictures of the child Goon Heu Man with his mother, Shiu Yue Yuk, on two separate occasions shortly after his birth.

It should be noted that the application for a passport for the child was submitted only about five or six months after his birth. Especially important also, was that, in addition to all this documentary and photographic evidence, the marriage took place in Hong Kong, the birth of the child took place in Hong Kong, and the mother and child lived in Hong Kong. Since there was an American Consul in Hong Kong, a thorough investigation was feasible, and in fact, conducted.

However, notwithstanding these facts, the Immigration Service by letter dated March 16, 1954, requested the father Goon Lun Poy to submit to a blood test for the [fol. 411a] purpose of determining the possibility of paternity in this case. In addition, the Department of State

advised by letter on March 29, 1954, that blood tests were being taken of this one and one-half year old child.

CHIN TAI FOON 0300-456740

In this case, Chin Tai Foon, an American citizen of Chinese descent applied for a passport for his son Chin Yeu Chor. Chin Tai Foon's citizenship was recognized by the Immigration Service in three different entries to this country and also by the Department of State which had twice issued passports to him.

Chin Tai Foon's son, Chin Yeu Chor was born on August 1, 1932 in China. To support his claim of parentage, Chin Tai Foon submitted the following: (1) a family picture taken in early 1934 showing himself, his wife, Liu Shee, Chin Yeu Chor at the age of about two, and another son, Chin Hunt Chor, who was born on September 21, 1933, (2) a photograph of Chin Yeu Chor and Chin Hunt Chor (the two boys) at the age five and six, respectively, (3) a photograph of the father, the mother, the two boys (Chin Yeu Chor and Chin Hunt Chor, at the ages of about 13 and 14, respectively) and another son, Chin Ken Chor who had been born in 1945, (4) a family picture taken after Chin Tai Foon had returned to the United States in 1947, showing the two boys at the ages of 15 and 14, the third son, Chin Ken Chor, and another son, Chin Young Chor, who had been born in 1947, and the mother in this case. In addition numerous remittance receipts showing money sent to the family were submitted. The mother and children were living in Hong Kong for a few years before the application was submitted and in fact the children were [fol. 412a] attending school there. Moreover, the photographic evidence taken at the various stages of his life, from infancy to manhood, in the company of his family, clearly established his identity and relationship to the mother and father in this case. Nevertheless, inspite of this plethora of photographic and documentary evidence, the applicant, Chin Yeu Chor, and the father over here in the United States were blood tested, as well as the mother.

(Signed) EDWARD HONG
EDWARD HONG

[fol. 413a] EXHIBIT 31

BEFORE THE BOARD OF IMMIGRATION APPEALS

(Chinese Characters.)
JACKSON G. COOK
COUNSELOR AT LAW
18 EAST 41st STREET
NEW YORK 17, N. Y.

MURRAY HILL 9-1490

December 8, 1954

Mr. Ben Gim
551 5th Avenue
New York, New York

Dear Mr. Gim:

You have asked me to ascertain from the cases I have handled involving Chinese persons, whether I have ever had a case of a person applying for admission to the United States by virtue of being the child of an American citizen parent, where the applicant had a contemporaneous birth certificate and other documentary evidence, and where notwithstanding such evidence, was required to submit to a blood test. The case of Lee Siu Yiu, file number N. Y. 0300-422307, may be of interest to you.

Lee Siu Yu and her twin brother, Lee Siu On (subsequently deceased) were born on December 11, 1948 at the Taiwo Hospital, located at Lookchin Station, in Canton, China. A birth certificate was issued by Dr. Chow Lung of the Taiwo Hospital which recited that twin babies, Lee Siu Yiu and Lee Siu On were born to the parents, Lee Wah Ying, father, and Ng Shee, mother.

[fol. 414a] Later, the father, Lee Wah Ying petitioned for the admission of his child, Lee Siu Yiu, and the petition was approved by the American Consul who issued travel documents for the child to come to the United States. The evidence presented included the aforesaid birth certificate and photographs of the mother and child shortly after birth. The American Consul issued the travel documents after a thorough investigation and did not request a blood test.

When the child arrived with her mother, the Immigration Service subjected her and her parents to a blood test by the Public Health Service. On the basis of the Public Health Service tests she was found not to be the child of Lee Wah Ying. The Immigration Service ordered her exclusion. Convinced of their error, I had reliable blood tests taken which proved the Public Health Service in error, and they admitted it. The child was subsequently admitted and a tragedy averted.

Yours truly,

(Signed) JACKSON G. COOK
JACKSON G. COOK

[fol. 415] EXHIBIT 31

BEFORE THE BOARD OF IMMIGRATION APPEALS

March 11, 1955

Board of Immigration Appeals
United States Department of Justice
Washington, D. C.

RE: Lee Kum Hoy, et. al
0300/423253-4-5

Dear Sir:

In connection with the argument on appeal of the above entitled case in which the issue concerned is whether the Immigration Service practices racial discrimination in administering blood tests, I am submitting herewith a summary of the facts in the Pang Po Lin and Kwong Yuen case (VP 3 50892, 0300/475793), and request that this letter be added to the record as exhibit #31.

Chin Jung Fook, a naturalized American citizen of Chinese descent, married Pang Po Lin, a Chinese alien in Hong Kong in February 19, 1954. The marriage was performed in Hong Kong and the ceremony took place before Robert A. Aylward, American Vice Consul, and the American Consul Certificate of Marriage was issued February 24, 1954.

Chin Jung Fook then returned to this country and immediately filed a petition with the Immigration Service for the issuance of a visa to his wife. In the meantime, Pang Po Lin visited the American Consulate in Hong Kong and requested that her application be processed. On August 17, 1954, the American Consul was advised by letter that Pang Po Lin was pregnant and expected a child in October. Pang Po Lin, while pregnant, visited the American Consul, and advised them of her condition.

[fol. 416] On October 22, 1954, a son, Kwong Yuen, was born to Pang Po Lin, and the birth was registered in the office of the Registrar of Births for Hong Kong, and birth certificate No. 372782 was issued.

Shortly thereafter, Pang Po Lin, visited the American Consulate several times and advised them of the birth of her son. In December, 1954, the father, Chin Jung Fook, formally submitted an affidavit for the issuance of a passport for his son, Kwong Yuen, and submitted the birth certificate mentioned and various affidavits of support.

On March 2, 1955, Chin Jung Fook received a letter from M. F. Fargione, Acting Chief of Investigations Branch of the Immigration Service to appear at 70 Columbus Avenue, New York City, in connection "with an official matter". When Mr. Chin appeared he was requested to submit to a blood test, and did submit to a blood test, for which he paid the sum of $15.00.

If the testimony given by the Immigration Service witness at the reopened hearing is true, no blood test should have been necessary in this case. The marriage was performed in Hong Kong and witnessed by the American vice consul; the child was born in Hong Kong and the birth was officially record and a birth certificate issued; the father was a naturalized citizen; and most important, the mother and son were both living in Hong Kong and a thorough investigation was possible. For that matter, the mother kept in close touch with the Consulate during the period of her pregnancy and the Consular officials were personally acquainted with her.

The only conclusion one can draw from this case is that these persons were subjected to a blood test merely because

they were Chinese, since the plethora of other evidence of relationship obviated the necessity of a blood test to determine relationship.

Very truly yours

HONG & GIM

BY: BEN GIM

[fol. 418] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 373—October Term, 1955.

Argued May 7 and 8, 1956

Docket No. 23972

UNITED STATES OF AMERICA, ex rel. LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH, Relators-Appellees,

v.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service, Respondent-Appellant.

Before: Clark, Chief Judge, and Frank and Hincks Circuit Judges.

Appeal by respondent from an order of the United States District Court for the Southern District of New York, Edward J. Dimock, *J.*, sustaining a writ of habeas corpus and adjudging that the relators be admitted to the United States as citizens. Cross appeal by the relators predicating error on an interlocutory ruling of the Judge. On respondent's appeal, reversed and remanded with a direction to discharge the writ: on relators' cross appeal, affirmed.

[fol. 419] BEN GIM, New York, N. Y., for relators Lee Kum Hoy and Lee Kum Cherk, appellees and cross-appellants.

EDWARD J. ENNIS, New York, N. Y., for relator Lee Moon Wah, appellee and cross-appellant; Clifford Forster, New York, N. Y., of counsel.

HAROLD J. RABY, Assistant United States Attorney, Southern District of New York, N. Y., (Paul W. Williams, United States Attorney and Maurice N. Nessen, Assistant United States Attorney, on the brief), for respondent-appellant and cross-appellee.

OPINION—September 25, 1956

HINCKS, Circuit Judge:

This is an appeal from an order in a habeas corpus proceeding in which the relators are three Chinese-born minors claiming admission to the United States as citizens by derivation from one Lee Ha, concededly an American citizen, alleged to be their father. The respondent is the District Director of the New York District of the Immigration and Naturalization Service.

The putative father, who sued out the writ, came to the United States as a derivative citizen in 1926. He returned to China for a visit in 1929 and again visited China in 1938 for a period of 16 months. The relators, it is claimed, were begotten during these periods; Lee Kum Hoy being born in 1930, Lee Kum Cherk in 1939, and Lee Moon Wah in 1940. In 1949 the wife came to this country, and in 1952 the relators arrived. Lee Ha testified that prior to their arrival he had sent from this country substantial contributions to the support of his children in China but was unable [fol. 420] to furnish any documentary evidence of the transmission of such funds.

The original immigration hearing was held on August 14, 1952. The Board of Special Inquiry examined the relators and their parents with great particularity as to their village home in China, their dwelling house, various family celebrations, their neighbors and their relatives. The Board found that this testimony was "reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service."

Shortly prior to this hearing, two blood grouping tests of the entire family had been made. The results of the tests were put into evidence at the hearing and objected to by the relators. Although conflicting in some particulars, the data common to both tests established conclusively that Lee Ha could not be the father of two of the relators. Since the children all swore that they were brothers and sisters, the Board of Special Inquiry found that Lee Ha could not be their father and ordered all three excluded from the United States. The Board of Immigration Appeals supported the decision treating the blood tests as convincing evidence of non-paternity.

A writ of habeas corpus then issued followed by three successive hearings before the District Court. In the first of these the relators claimed that use of the blood test evidence deprived them of due process of law because they were not allowed to cross-examine the blood-test technician and because the tests were discriminatorily administered to all Chinese, and no whites. Judge Dimock held that the right to cross-examine the technicians had been improperly denied and, without passing on the claim of discrimination, remanded for rehearing before the Board of Special Inquiry, 115 F. Supp. 302. An adverse decision by the Immigration Service again brought the relators before Judge Dimock. This time he held that the blood test evidence had [fol. 421] been properly received if the tests had been taken without undue discrimination but feeling that the evidence on the issue of discrimination was inconclusive he ordered another rehearing on that issue, 123 F. Supp. 674. After the Immigration authorities again ruled against the relators, Judge Dimock, in his third opinion, reported at 133 F. Supp. 850, found that the blood tests were administered to all Chinese and to no whites, and held that this was illegal discrimination. Accordingly, he sustained the writ and ordered the relators to be admitted as citizens of the United States.

From this order, the respondent appeals. The relators by their cross-appeal predicate error on Judge Dimock's ruling in his second decision that even without the sanction of statute or official, authorized, regulations the Immigra-

tion Service may make use of blood testing as a method of non-discriminatory investigative procedure.

At the administrative hearings evidence relative to the claim of anti-Chinese discrimination was developed as follows. When American Consulates in China were closed, the Consulate in Hong Kong was flooded with passport applications by those theretofore living in the interior of China. The State Department then began taking blood tests in Hong Kong as a check on claims of paternity. The results of the tests having there proved useful as an investigative device, the procedure was adopted on an informal basis by individual investigators of the Immigration Service in its examination of Chinese arrivals beginning at some time, not precisely identified, in 1952. Between June 1952 and November 1953, at the request of the Immigration Service, 200 Chinese were blood tested by the Health Service, pursuant to a Federel Security Agency circular authorizing it to test United States citizens of Chinese descent. The Immigration Service also referred Chinese claimants to private physicians to make blood tests, one of whom testified that between early 1952 and November 1953 he tested [fol. 422] 300 Chinese and no whites. To refute the respondent's contention that such tests were required of Chinese only in cases in which a birth certificate and opportunity to make a local investigation of paternity were absent (as was generally true of those born and raised in the interior of China), the relators put in evidence proof of four cases of Hong Kong Chinese, who had birth certificates issued by the British government or the American Consulate in each of which blood tests had been requested. In three of these cases the request for blood tests was made between July 24, 1952 and June 2, 1954.

The first formal authority for the use of blood tests was contained in a precedent decision of the Board of Immigration Appeals handed down on February 25, 1953. The Immigration Service first promulgated instructions relating to blood tests in early 1953. The early instructions dealt only with visa petitions and certificates of citizenship: they did not directly or indirectly purport to apply to exclusion proceedings. While the early directives did mention the

use of blood tests specifically in Chinese visa petition cases and applications for certificates of citizenship, those instructions at no time directed the use of blood tests exclusively in Chinese cases and at no time precluded the use of blood tests in non-Chinese cases.

More recently, some time in 1954, all of those instructions were rescinded and all current instructions concerning the investigation techniques with respect to cases wherein blood tests are deemed essential or necessary do not directly or indirectly refer to any racial or nationality group but predicate the requirement on the nature of the case and the issue of paternity or the relationship which is involved. No instruction of any kind as to Chinese or other persons has been issued with respect to exclusion hearings before Special Inquiry Officers.

[fol. 423] The respondent, in an effort to show the blood testing of non-Chinese, pointed to four cases of testing in the 1952-1953 period but none of these were definitely identified as involving persons of non-Chinese extraction. The respondent offered as a witness an Attorney-Advisor in the office of District Counsel for the New York office of the Immigration and Naturalization Service who since 1941 had experience in the Service as a Naturalization Examiner and Chief of the Status Section. Since 1946 he had been assigned to that office as Attorney-Advisor in which capacity he had had first-hand knowledge of all policy decisions and had participated in thousands of litigated cases, including cases involving evidence of citizenship involving Chinese persons. He testified that Chinese cases in the large fell within the general pattern described in *Mar Gong* v. *McGranery*, 109 F. Supp. 821 (S. D. Cal. December 15, 1952),* and that a high incidence of fraud had been developed in the cases

---

* That case was reversed and remanded on appeal. *Mar Gong* v. *Brownell*, 9 Cir., 209 F. 2d 448. However, the appellate decision held only that fraud in other cases was not a proper factor to consider in making a judicial finding as to the alleged citizenship involved in a particular case such as the case there at bar. The opinion did *not* suggest that knowledge of frauds attempted in cases of a similar pattern might not be considered for its bearing on the scope of investigation appropriate in the particular case. Indeed, blood testing was involved in the *Mar Gong* case.

falling within that general pattern.** He testified further as follows. The Service had discovered that in bringing Chinese-born children to the United States there had developed a practice to prepare coaching books or "Halgoos" comprising an extensive written summary of family background reciting alleged details of family life, village, neighbors, schooling and local geography, which the alleged [fol. 424] members of the family memorize and use as the basis for the answers to the questions asked of them severally, thus avoiding inconsistencies and concealing evidence of fraud which might otherwise develop on their respective examinations. The complicated structure of the Chinese calendar, the similarity of humble Chinese homes and villages as well as the Chinese language were unique factors which added to the difficulty of testing the credibility of witnesses in Chinese cases by separate examination as to the detail of significant family dates and abodes. This witness further testified:

"* * * As a matter of fact, it has been my experience that a substantial, if not the major proportion of all Chinese children arriving in the Untied States are admitted to the United States on primary inspection because no doubt exists as to their admissibility. But the large incidence of fraud in Chinese cases is known and is recognized; although the fraud in one of a thousand cases is never imputed to other cases, nonetheless, it does form a very substantial and very rational basis for being particularly cautious in examining and in investigating cases which fall into the same pattern as the Chinese cases which have been demonstrated to be fraudulent, so that the Government's interests will be protected and the Government will not be imposed upon by fraudulent claims."

He testified further:

"For this reason, when the use of blood tests on such issues first came to the attention of the Immigration

** The administrative record, however, contained no evidence of the comparative incidence of fraud in Caucasian, or non-Chinese, cases involving the issue of paternity. It suggests at most, that only a small proportion of the non-Chinese cases fell within the range of the Chinese pattern described in 109 F. Supp. 821.

authorities, it was seized upon as one of the first genuinely, tangible methods of reaching the truth. It is the position of the Immigration Service that the use of blood tests under such circumstances is not discrimina- [fol 425] tory—but is necessary, by reason of the pattern and type of case!—and not because the persons involved happen to be of the Chinese race."

The respondent's witnesses categorically denied that racial discrimination in the use of blood tests had ever existed and attributed the number of Chinese tested in the 1952 period to a proper police motive on the part of individual investigators adequately to investigate cases which seemed suspicious against their current background, evaluated by the actual experience of those responsible for the enforcement of the applicable law. Their testimony showed that at a later period an increasing number of non-Chinese were blood tested.

We agree with the relators that this case is not governed by our former decisions in *Lue Chow Kon* v. *Brownell*, 2 Cir., 220 F. 2d 187, and *Dong Wing Ott* v. *Shaughnessy*, 2 Cir., 220 F. 2d 537. The evidence of discrimination here is substantially more compelling than that before us in those cases. However, we do not recede from our holding in those cases that blood tests, if not taken because of discrimination on racial grounds, are competent evidence on the issue of paternity, at least in federal courts sitting in the State of New York. We overrule the relators' contention, raised by their cross-appeal, that evidence of the blood tests was improperly received because of lack of administrative authority to make use of blood tests. Even in the absence of express authority embodied in official rules or directives, we hold that in the situation here responsible official personnel had authority to utilize any non-discriminatory, investigatory technique reasonably appropriate. The ruling complained of is sustained and the order complained of by the cross-appeal is affirmed.

We hold further that on the entire administrative record, only the salient portions of which are set forth above, the [fol. 426] finding below that the testing of these relators was actuated by racial discrimination, was not warranted.

It is true that in the 1952-1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any non-Chinese case or of Chinese admitted without blood testing.* Nevertheless we think it more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult [fol. 427] cases. As the Special Inquiry Officer pointed out in his opinion, the technique of blood tests to check claims of paternity was a new procedure which originated in the

---

* After the entry of the order below, the respondent moved to reopen to permit additional evidence to be taken by the court. The motion was supported by an affidavit made by an Investigator of the Naturalization Service detailed to investigate cases involving possible frauds perpetrated by persons of the Chinese race in connection with their admission to the United States. His affidavit recited, *inter alia*, that an examination of cases in the New York office of the Service made at the request of respondent's counsel disclosed a list, appended as Exhibit A, of 60 cases, each identified by file number, of white persons who had been blood tested between January 10, 1955 and August 4, 1955, and another list, appended to his affidavit as Exhibit B, comprising 124 Chinese-born persons admitted between March 31, 1952 and June 2, 1952, of which 40 had not been blood tested.

This motion for a reopening was denied without opinion or comment. We think it plain that the facts thus sought to include in the record, if established after proper cross-examination, would have had some substantial weight to refute the evidence indicative of racial discrimination. It is true that the blood testing of whites in 1955 does not fully demonstrate the absence of anti-Chinese discrimination in 1952. But even so it is a factor which would make it more reasonable to attribute the absence of blood testing for whites in 1952 to the administrative difficulty of immediately expanding a newly utilized investigating technique which happened to begin with Chinese-born entrants to cover entrants of all other national extractions. Perhaps the motion was denied because deemed untimely; perhaps because the judge below thought that the evidence proffered, even if received, would not alter his finding of discrimination. In view of our contemplated disposition of this appeal, we do not need to pass upon the propriety of that ruling.

American Consulate in Hong Kong whence it spread to the Immigration Service. We agree with him that discrimination did not result because in less than two years it was not immediately adopted in every case. We affirm substantially on the grounds stated in the last "decisions" of the Special Inquiry Office and the Board of Immigration Appeals, being satisfied that on the whole the administrative record supported the conclusion reached therein, viz., that discrimination had not been proved. Cf. *Tulsidas* v. *Insular Collector*, 262 U. S. 258; *O'Connell ex rel. Kwong Han Foo* v. *Ward*, 1 Cir., 126 F. 2d 615.

Certainly, there was no evidence that in any other particular cases the particular investigating officer or Special Inquiry Officer involved was actuated by racial prejudice either in requesting blood tests or in processing the case without blood tests: so far as the direct evidence shows the scope of investigation in every case processed was adjusted to accord with doubts as to the bona fides of the applicant's claimed paternity and to the availability of local sources of information at the applicant's foreign residence. And even if, contrary to our view, occasional prejudice on the part of individual officers of the Service were deemed proved by inference arising from the preponderance of Chinese cases among those blood tested, it does not follow that the officers responsible for the policies of the Service had consciously, in 1952, adopted a discriminatory policy. Surely the policy-makers were not under duty to re-examine cases disposed of with or without administrative appeal, apparently on a factual basis, in a search for an undisclosed discriminatory motive on the part of the particular officers, or to keep elaborate and expensive statistics classifying each case for its race and nationality, and devel- [fol. 428] oping the particular reasons which had determined the scope of the investigation made by the individual investigators. The evidence showing that no such statistics were currently accumulated, warrants no inference to bolster the relators' case on the issue of discrimination. Rather, we think, it tends to betoken that in 1952 the Service was not even race-conscious in the formulation of its investigative policies. It also furnishes a reasonable explanation for the respondent's difficulty and occasional

inconsistencies (too much stressed below) in attempting for purposes of the reopened hearing of October 28, 1954 to determine and synthesize into a general pattern the evanescent reasons on which individual officers had shaped the scope of numerous investigations made two years before.

In our judgment, the four cases of Hong Kong Chinese, earlier adverted to, of applicants who were blood tested although possessed of birth certificates issued by the American Consulate, are not enough to impugn the administrative conclusion. At most, those cases are of slight weight in showing the then existence of racial discrimination and certainly are not conclusive of discrimination against these realtors.

The respondent's appeal is reversed with a direction to dismiss the writ. Affirmed on the cross appeal.

FRANK, CIRCUIT JUDGE (DISSENTING AS TO RESPONDENT'S APPEAL):

I concur in the affirmance on relators' cross appeal. As to respondent's appeal, I dissent, for the reasons stated by Judge Dimock in his opinions reported in 123 Fed. Supp. [fol. 429] 674[1] and 133 Fed. Supp. 850.[2] I shall not repeat

---

[1] In 123 F. Supp. 674, 677-678, Judge Dimock said:

"Relators allege deliberate use of the blood test technique to exclude Chinese and admit others similarly qualified except for race. This result is reached, they say, because the application of the blood tests to Chinese and not to others constitutes more stringent enforcement of the immigration laws against Chinese than against others. Chinese persons, they say, are always subjected to the rigorous inquisition of a blood test while others, no matter how inconclusive may be the other evidence, are never subjected to a blood test. If such a deliberate use of the blood test technique to exclude Chinese exists, the discrimination against Chinese is clear even though the result may be to allow the admission of unqualified non-Chinese rather than to prevent the admission of qualified Chinese. It makes no difference that the complaint of the Chinese is against a failure to go to the full extent of the law in the case of non-Chinese rather than against going beyond the law in the case of Chinese. A minority could be as effectively persecuted by enforcing a law against them alone as by

in detail his statement of the evidence or his reasoning. I think the record amply justified his conclusion (133 Fed. Supp. at 852) that, "It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of ad- [fols. 430] ministrative finality will not support a determination to the contrary. The Government has been unable to point to a single instance where a white person had been subjected to a blood test or a Chinese excused from one." Judge Dimock seems to me to show, unanswerably, that we have here an unconstitutional administration of a valid statute.[3]

He carefully pointed out how the government, in the several stages of the hearings before him, kept shifting its position in a way which warranted his distrust of its protestations of an absence of discrimination.[4] On the third

---

acting against them without warrant of law. Racial discrimination is abhorrent to our institutions. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; *Hirabayashi* v. *U. S.*, 320 U. S. 81, 100, 63 S. Ct. 1375, 87 L. Ed. 1774; *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693."

[2] In 133 F. Supp. 850, 854, Judge Dimock said:

"The worst that can be assumed is that these three Chinese children sought admittance to the United States upon a false claim of paternity. They made an affirmative showing of paternity that would have been sufficient but for the requirement that they submit to blood tests. They have been excluded. Members of the white race in exactly the same position are admitted. The Chinese and white persons thus differently treated constitute a single class but for their color. The Chinese of this class are excluded and the white admitted. That constitutes a deliberate strict enforcement of the immigration laws in the case of Chinese and a deliberate loose one in the case of whites. As I stated in *U. S.* v. *Shaughnessy*, *supra*, 123 F. Supp. 674, at pages 677-678, such a practice violates the constitution. See, besides the cases there cited, *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873; *Mar Gong* v. *Brownell*, 9 Cir. 209 F. 2d 448; *Lau Hu Yuen* v. *U. S.*, 9 Cir. 85 F. 2d 327."

[3] See, e.g., *Yick Wo* v. *Hopkins*, 118 U. S. 356.

[4] In 133 F. Supp. at 852-853, Judge Dimock said:

"In July of 1953, when charges of racial discrimination against the Chinese in blood tests were first made in relators' application for a writ of habeas corpus, the government denied that Chinese were singled out for such tests and claimed that

[fol. 431] administrative hearing (held pursuant to Judge Dimock's opinion reported in 123 Fed. Supp. 674) respon-
[fol. 432] dent introduced the testimony of an Attorney-Advisor in the New York office of the Service. This testimony was designed to rebut the strong case of discrimination theretofore made by relators. This witness

---

blood tests were required in all cases where there were no birth certificates or other documents of identity. Thus, in the Government brief, it was stated that blood tests were not imposed upon Chinese persons alone, but upon 'all persons attempting to enter the United States without birth certificates and similar documents.' Similar statements were contained in several subsequent government affidavits to the effect that blood tests were required only in those cases where there was an absence of birth certificates and other documentary evidence of identity.

"In answering this argument of the government, relators cited two cases where Chinese persons were blood tested notwithstanding the fact that they had birth certificates. This was noted by me in my decision at 123 F. Supp. 674, 677, *supra*, where I said that these two cases lent substance to the claim that Chinese, regardless of the availability of birth certificates or other documents, were always subjected to a blood test while other persons never were.

"In the reopened hearing following that decision, the Immigration Bureau witness sought to minimize the importance of birth certificates in determining whether a blood test was necessary, stating that it was 'only one of the many criteria' for determining whether a blood test was needed in a particular case. According to the witness there are three common patterns of children of American citizens born abroad who apply for admittance to the United States as citizens. The first involves an American child in an 'American colony' abroad, whose parents keep in close touch with the Consulate, and where the births and marriages would be registered at the Consulate. The second pattern, which, like the first, is not the usual pattern for Chinese children, would be where the American parent is not known to the Consulate, but where birth and marriage certificates are produced to substantiate the claim and, most important, the children involved are born in an area where the Consul could speedily conduct an investigation and ascertain from neighbors, friends and local government officials, the true identity of the child.

"In the foregoing two patterns of cases, the witness stated 'there would be no need for using blood test evidence to verify an obvious relationship.' The third type of situation was one which he said was typical of Chinese. This was where the child

narrated instances purporting to prove absence of discrimination, and added his impressions of the administrative practices. Relators were denied the opportunity to see the administrative records to which this witness had referred. The witness conceded, on cross-examination, that his testimony was inconsistent with statements previously made

---

was born in the remote interior of China, where no birth or marriage certificates were kept, and, most important of all, the claimed area of birth was inaccessible to the Consul and hence where he could not conduct any investigation as to the circumstances of the child's birth. The witness then concluded and reaffirmed on cross-examination that the most important factor in determining whether a blood test would be required is whether a child is born in an area where the American Consul can readily conduct an investigation. He said that, if the Consul could verify the identity of the child involved from his investigation, by talking to neighbors, friends and local officials, there would be no need for a blood test.

"Although the witness testified that the most important criterion for determining the necessity of a blood test—namely, the ability of the consulate to investigate the area of a person's birth—had been a factor in immigration investigations which antedated by a long time the use of blood tests, he admitted that, in the government brief filed when this case was first argued, there was no mention at all of this 'most important' criterion. Similarly, in the subsequent government affidavits filed prior to the issuance of my decision, the Immigration Service had stated specifically that blood tests were required in cases where there were no birth certificates or documentary evidence, and there was no mention whatsoever of the feasibility of a consular investigation as being determinative of whether blood tests were necessary.

"To show that Chinese persons claiming a right to enter the country as children of United States citizens are always required to submit to blood test, irrespective of how satisfactory their other proof as to identity was and regardless of whether they were born in an area where a consular investigation was possible, relators cited several cases as examples.

"Exhibit No. 27 involved L-L the son of L-H, an American citizen of Chinese descent. L-L was born in Hong Kong, and produced a contemporaneous official birth certificate issued by the British government to prove his identity. This certificate stated the names of his parents and the place and date of his birth. In addition, the parents of L-L, having been married in Hong Kong, produced a marriage certificate. Most important, the son and mother were living in Hong Kong, and an investigation by the American Consul there was thoroughly feasible,

[fol.483] by him in the return to the writ of habeas corpus. I think his testimony, which my colleagues stress, was wholly insufficient to offset relators' proof of discrimination.[5]

The administrative decision, made in 1952, adverse to relators, rested solely on the blood test evidence. Judge Dimock found (I think correctly) that such blood tests were discriminatorily applied as against Chinese persons; that therefore that evidence was improperly received; and that, except for that evidence, the record entitled relators to ad-

---

and in fact conducted. Nevertheless, L-L, a child only a year and a half old at the time, was subjected to a blood test along with his father and mother.

"Exhibit No. 28, involves Ng Ho Gim, an American citizen of Chinese descent, who petitioned for his six year old son who was living in Hong Kong with his mother. His son was born in Hong Kong and his birth was registered at the American Consulate which issued a certificate verifying the birth of the child and the marriage of the parents. Notwithstanding the American Consulate's own certificate acknowledging the identity of the child and the fact of his parents' marriage, and in spite of the fact that the child was living in Hong Kong, thus making a thorough investigation possible, a blood test was still demanded of the parents and the child.

"Exhibit No. 29 involves a naturalized American citizen of Chinese descent who married a Chinese alien woman in Hong Kong who subsequently gave birth to a child there. In a petition to bring his son over, the citizen submitted a contemporaneous birth certificate issued by the British government for his son, and his marriage certificate, also issued by the British government. In addition, the son and wife were living in Hong Kong where an investigation was feasible. But most important there were prior records of the wife and son at the American Consulate and the Consul had been for a long time cognizant of the family relationship of the individuals. Nevertheless, a blood test was required of all the parties.

"Exhibit No. 30 involves an American citizen of Chinese descent who married a Chinese alien in Hong Kong to whom a son was later born, also in Hong Kong. The citizen parent had a contemporaneous birth certificate issued by the British government for his son, and a contemporaneous marriage certificate for his marriage issued by the British government. In addition, the child being born and living in Hong Kong with his mother, the American Consul was able to conduct a thorough investigation. Nevertheless a blood test was required."

[5] See footnote 4.

mission. Accordingly, they should have been admitted in 1952. It is suggested that this conclusion is artificial and academic, for this reason: Since the time of the adverse administrative decision in 1952, blood tests have been applied without discrimination, so that, if there were now a new administrative hearing, new blood tests could be received properly and would prove that relators are not citizens. I cannot agree with this argument: On the record, as it stood when the adverse administrative decision was made in 1952, defendants should have been admitted at that time, and therefore we should deal with the case as if they had been.

At first glance, it might seem absurd that the blood test evidence should be disregarded, inasmuch as it demonstrates that relators are not citizens.[6] But such was the sort of result reached in the justly famous case of *Yick Wo* v. *Hopkins*, 118 U. S. 356. There the relator had been convicted of a violation of an ordinance, and the Supreme Court accepted that violation as a fact. Nevertheless, the Court held that relator must be released on a habeas corpus writ because the ordinance had been discriminatorily ap- [fol. 434] plied to Chinese alone. The Court said (118 U. S. at 373-374): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." See also, e.g., *Norris* v. *Alabama*, 294 U. S. 587, 589; *Smith* v. *Texas*, 311 U. S. 128, 130-131; *Patton* v. *Mississippi*, 322 U. S. 463, 465-466.

It might be argued that the doctrine of *Yick Wo* v. *Hopkins* turns on the requirement of "equal protection of the laws" found in the 14th Amendment and that there is no like provision applicable to the federal government. But in *Bolling* v. *Sharpe*, 347 U. S. 497, the Court said, "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the

[6] Cf. a case where a decision rests on evidence which indubitably proves a defendant's guilt, but has been obtained by an unlawful search and seizure.

concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as the Court has recognized, discrimination may be so unjustifiable as to be violative of due process. Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[7]

---

[7] I think it would be improper to direct Judge Dimock now to take evidence as to relators' citizenship in a *de novo* judicial hearing. If relators had been residents of this country, and on their re-entry had asserted their American citizenship, they would have been entitled, on their demand, to such a judicial hearing *de novo*. See *Chin Yaw* v. *U. S.*, 208 U. S. 8; cf. *U. S. ex rel. Madeiros* v. [fol. 435] *Watkins*, 166 F. 2d 897, 900 (C. A. 2, dissenting opinion); *Shaughnessy* v. *Mezei*, 345 U. S. 206, 214-215. On the facts of this case, however, the sole function of Judge Dimock was to determine whether the administrative finding of lack of citizenship was supported by the evidence received at the administrative hearing in 1952 and to decide whether the administrative decision adverse to relators was legally justified. *Shaughnessy* v. *Mezei*, 345 U. S. 206, 213-215. Judge Dimock decided that the evidence properly received at the administrative hearing did not support the administrative finding and the administrative decision, and that, as of 1952, relators were entitled to come into this country as citizens.

After Judge Dimock had filed his opinion sustaining the writ, the government moved for a reargument and for a hearing *de novo*, on new evidence, before Judge Dimock. This motion was supported by an affidavit of Inspector Yarbrough. In part the affidavit related to an irrelevant showing of lack of discrimination beginning in 1955. Attached to the affidavit was an Exhibit showing that 40 Chinese persons, out of a total of 124, had been admitted without blood tests between March 1 and September 30, 1952. Relators in a reply affidavit stated: "It will be noted that most of these persons were admitted during the first part of the period involved before blood tests for all Chinese applicants was officially commenced. Moreover, the date of admission no doubt is the date of the final determination of admission and is not the earlier date of the arrival of the applicants at which time they would be examined by the Immigration Service. Dr. George F. Cameron of the United States Public Health Service testified in this case that he did not start blood testing until June 1952. It is obvious that a

[fol. 436] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. Charles E. Clark, Chief Judge. Hon. Jerome N. Frank, Hon. Carroll C. Hincks, Circuit Judges.

UNITED STATES OF AMERICA ex rel LEE KUM HOY, LEE KUM CHERK and LEE MOON WAH, Relators-Appellants,

v.

EDWARD J. SHAUGHNESSY, Dist. Dir. of Immigration and Naturalization Service, Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York

JUDGMENT—September 25, 1956

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that on respondent's appeal the order of the said District Court be and it hereby is re-

---

number of Chinese may have escaped blood testing in March, April and May, or even in June, before the mechanics for blood testing were devised and before the practice became uniformly established as it was at the time that the relators in this case were blood tested in July and August 1952. Dr. Cameron testified that when he began blood testing in June 1952 he was directed to blood test only Chinese and that he did not blood test any white persons. It is submitted therefore that Exhibit B annexed to Investigator Yarbrough's affidavit is of no assistance and supplies no basis whatsoever for a rehearing. Moreover, the statement that one Chinese recently was not blood tested obviously has no bearing on the uniform practice of blood testing all Chinese which was proved to exist commencing in June 1952."

I think Judge Dimock correctly denied this motion. In addition to the insufficiency of the proposed additional evidence, it would have been improper for the judge to hold a *de novo* hearing. Moreover, the motion was an application for a new trial upon newly discovered evidence, and all the suggested new evidence had previously always been in the government's possession.

versed with direction to dismiss the writ in accordance with the opinion of this Court.

Further ordered that on the relators' appeal the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 437] [File endorsement omitted]

[fol. 438] Clerk's Certificate to Foregoing Transcript (omitted in printing)

[fol. 439] Supreme Court of the United States

No. 545—October Term, 1956

[Title omitted]

Order Allowing Certiorari—Filed January 14, 1957

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the question of whether there was unconstitutional discrimination against petitioners by the use of blood tests in determination of their application for entry to this country. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

Letter on the stationery of David Kaufman dated November 26, 1954 is entered into evidence as Exhibit #28.

Letter on the stationery of Andrew Reiner dated November 24, 1954 is entered into evidence as Exhibit #29.

Letter on the stationery of Hong & Gim, not dated, signed by Edward Hong, is entered into evidence as Exhibit #30.

You may continue.

Attorney Ennis to Mr. Friedman:

Q. Now, Mr. Friedman, do you know of any case involving white persons where the birth and marriage records are produced and also the birth is in a place where the consul could investigate and yet, nevertheless, a blood test was required? A. Well, the cases I have already referred to which were in New York City in this district, were British subjects. I don't know their race other than I recall that they were not Chinese but they did have birth certificates and parents' marriage certificates and the investigation was possible, but—nevertheless, blood tests were requested. As a matter of fact the blood test in that case was requested because the investigation that was conducted threw some cloud or doubt upon the relationship.

Q. Do you know whether they were British subjects from the British West Indies? A. Yes, they were.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954; Reported in 123 F. Supp. 674

Q. Don't you think it likely that they were negroes? A. It's quite possible judging from the name and the place of birth.

Q. Do you affirmatively know any such cases involving white persons where blood tests were required? A. Except for the two cases in Los Angeles which were not Chinese, I know of no other cases and of the Los Angeles cases, I do not know the race other than they were not Chinese.

Q. You have not been able to identify those two cases? A. No, I have not.

Q. What is really the sum of your information about those cases? A. Merely the fact that two cases arose in the Los Angeles District in which an issue of identity and paternity was involved and in which a blood test was requested because of that issue and the fact that the persons involved or the family,—families involved, were not Chinese.

Q. Do you know that they had birth certificates? A. I have no knowledge of any kind concerning the details of the cases.

Q. Well then, you don't know that they fit into the category of cases with both birth certificates and opportunity to investigate. You just know there are two cases of two persons who were not Chinese who had a blood test. A. Where blood tests were required. I don't even know the result of the blood tests.

Attorney Ennis to Special Inquiry Officer: Well, Mr. Special Inquiry Officer, Mr. Friedman is testifying here as the Immigration Service expert and

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

states that he knows of no cases involving white persons in which the birth records and the opportunity to investigate were present in which blood tests were required.

Special Inquiry Officer to Attorney Ennis: I have noted that testimony.

Attorney Ennis to Special Inquiry Officer: And I have no further questions.

OFF RECORD DISCUSSION

ON THE RECORD

Attorney Gim to Special Inquiry Officer: I offer that letter in evidence dated December 7th supplementing the letter of November 17th.

Special Inquiry Officer to Attorney Gim: The copy of a letter which you have just handed me is also now attached to this file, but I'll make it a part of the record as an addition to Exhibit 26 and insofar as your request in that letter is concerned, the Immigration Service has offered or presented a witness to testify as to matters concerning the history, initiation of, policy and practice of the blood testing of persons of Chinese ancestry and other persons and I believe your request is complied with so that no further action is necessary.

Special Inquiry Officer to Attorneys Gim & Ennis: I presume then that both of you have concluded your cross-examination of Mr. Friedman.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

By Attorney Gim: That is right.

Special Inquiry Officer to Attorneys Gim & Ennis: Is there any other evidence that you wish to offer in these proceedings?

Attorney Ennis to Special Inquiry Officer: Not unless the Government proposes to offer additional evidence to which we might have some reply material.

Special Inquiry Officer to Attorney Ennis: That I can well understand. I'm speaking of any further evidence because Mr. Gim did make some mention of the possibility of presenting witnesses or some other type of evidence and I wanted to know whether that was ruled out now for the moment.

Attorney Ennis to Special Inquiry Officer: Yes, sir.

By Special Inquiry Officer: At the close of the last hearing on 'off the record' you may recall you gave me a number of file numbers relating to certain Chinese cases and asked if I would examine those so that we might glean some evidence of value for this hearing from them and of course, as you know, I can't make the files available to you—so that I have decided to read them myself and paraphrase for the record after identifying the file by number,—whatever it contains which might be of some value in a decision in this case.

Attorney Gim to Special Inquiry Officer: My original request was to examine the files myself.

Special Inquiry Officer to Attorney Gim: I am

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 671

well aware of that but that's not possible so as an alternative I agreed that I would examine them and paraphrase them.

Off Record Discussion

On the Record

Special Inquiry Officer to Attorney Gim: I might say at the outset that many times a file does not contain everything with relation to a particular case in that there are relating files and in that files go from one part of the country to another and getting things together is sometimes very difficult. I can only tell you what I see in the files as I have them before me in their present state.

First, with reference to file VP3-8290 in the Matter of G.L.P.:

This appears to be a case involving a petition by an American citizen for his wife to whom he was married in 1951 in Hong Kong. It also reveals that the petitioner had been previously married to someone else who had passed away and I see a reference in this file to the fact that the child was born in Hong Kong but I see no indication in the file that blood tests were ever requested, although they might have been.

Attorney Gim to Special Inquiry Officer: Do you see a letter from the Immigration Service to G.L.P. dated March 1954 requesting him to appear before

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

the Immigration Service and see a certain inspector?

Special Inquiry Officer to Attorney Gim: I see no such letter on this file. As I pointed out previously, it might be very well on another file which was set up perhaps for the wife or for the child as a separate file, so that it is difficult to search our records for the information which you have requested. I do not dispute anything you want to say about it but I merely tell you what I find in this file as it stands today.

The next file which I examined was 0300-426056 in the Matter of C.H.K. and C.H.Y., two children:

And I see a request was transmitted to the Immigration Service by the American Consul in Hong Kong requesting that a blood test be made of the husband father and that the results be forwarded to the consulate as soon as possible. This was in a letter dated December 29, 1952 in Hong Kong. The file also reveals that prior to the receipt of this request from the American Consul this Service had approved a visa petition by the same applicant for his wife. These children were born in the interior of China and the parents were married in 1952 in China.

The next is a group of files: 0300-422306 in Re: N.L.K. and VP3-49029 relating to Y.H.L.:

This relates to these two persons who were applicants for admission to the United States and were referred to a Board of Special Inquiry for

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

hearing in May 1952. Hearing was held in July 1952. It reveals in part that the marriage of the American citizen to his wife, one of the applicants, took place in Hong Kong but that the American citizen husband returned to the United States after which the wife then returned to the interior of China and their child was born in Canton as evidenced by a document issued by a hospital in Canton, in 1948,—but it is noted that these applicants did not come to the United States until 1952 when the interior of China was, of course, cut off and the applications to come to the United States were processed in Hong Kong. These subjects were blood tested and ultimately the blood testing was found to be in consonance with the possibility of parentage and that together with other evidence led to their admission to the United States.

OFF RECORD DISCUSSION

ON THE RECORD

Special Inquiry Officer to Attorney Gim: I note Mr. Gim that the letter which you offered previously from Jackson G. Cook relates to this particular case. As long as I have gone this far in reference to this particular case and file I'll take the letter if you think it worthwhile.

Attorney Gim to Special Inquiry Officer: I submit it in evidence.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

By Special Inquiry Officer: Letter on the stationery of Jackson G. Cook dated December 8, 1954 is entered into evidence as Exhibit #31.

Special Inquiry Officer to Attorney Gim: The next file I examined was 0300-433037 in the Matter of C.N.O., a child:

> And I note in the file a request from the American consul dated January 26, 1953 requesting that the parent or parents of the person involved be blood tested as he was a resident of New York.

Attorney Gim to Special Inquiry Officer, (Interposing): Would you state for the file that these are all Chinese persons?

Special Inquiry Officer to Attorney Gim: Yes, of course. All these files relate to Chinese persons.

The child in question was born in the interior of China in 1941 although the parents were married in 1936 in Hong Kong.

The next file, VP3-46524 relates in general to a wife and two children.

(At this point Attorney Ennis is excused from the hearing room.)

> The marriage in this case took place in 1932 in China and one child was born in 1933 in China and the last child was born in 1949 in Hong Kong and there was presented a birth certificate of the youngest child from the authorities in Hong Kong and an affidavit of a doctor

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

in Hong Kong with relation to the birth of the youngest child. The father was requested to submit to a blood test, the results of which were transmitted, together with other reports in the case, to the American Consul abroad.

Another file: Visa Petition #3-27199, the petition of N.W.H. in behalf of N.W.L. for a non-quota visa as the son of a naturalized citizen of the United States:

The father in New York was requested by the Service to submit to a blood test on December 7, 1953. The child, on behalf of whom the application was made, was born in China in 1938. In 1953, the son was in Hong Kong applying for admission, but the mother—who married the petitioner many years before in China was still in China at that time. The marriage took place in 1922.

This I believe covers all of the file numbers that you gave me after the close of our last hearing.

Attorney Gim to Special Inquiry Officer: I believe you said, Mr. Chairman, that these files are not necessarily complete and that they may not necessarily contain all of the information. Is that right?

Special Inquiry Officer to Attorney Gim: That's right, but whatever information I've listed for the record I find in these files as they now exist.

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

OFF RECORD DISCUSSION

ON THE RECORD

Special Inquiry Officer to Mr. Friedman: Mr. Friedman, you of course are intimately aware of the legal problems involved in this case—which I am called upon to make a decision upon and I know that you are aware of the Judge's Order which called for testimony to be taken in this case with regard to the subject of possible prejudice.

Counsel for the respondent have examined you and I have no particular questions in mind on any points that I believe need clarification. However, I should like you to feel free now at this time, if you want to, without being repetitious of anything that you have said in your first appearance, to give us any further information that you can on the question of the alleged prejudice in the operations of the Immigration Service with regard to Chinese persons that has not been spoken of.

By Mr. Friedman: I think perhaps it would aid in clarifying the entire picture in the record in this case if I would add a few additional comments dealing with information which is known to every investigator in the Immigration Service who has had before him many problems dealing with identity and relationship, particularly in Chinese cases.

At the outset, I think I can shorten the testimony considerably in that respect by making reference

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

to the comments of a District Judge in the case of *Mar Gong*, which arose on the West Coast. I believe the citation in that case is contained in the judicial proceedings in this case. In that case, the Judge took cognizance of various known statistics relating to Chinese all of which are well known to the Immigration and Naturalization Service and have been well known for many years. In alluding to these statistics I want to emphasize that the Immigration Service has never at any time taken the position that because of the large incidence of frauds in Chinese cases that the next Chinese case that comes before it will necessarily be fraudulent. Each case has always been considered on its own individual merits and perhaps the best evidence of that lies in the fact that the vast majority of all Chinese cases have been resolved successfully for the Chinese applicant, by that I mean, that the applicant has been granted a visa petition or has been admitted to the United States. As a matter of fact, it has been my experience that a substantial, if not the major proportion of all Chinese children arriving in the United States are admitted to the United States on primary inspection because no doubt exists as to their admissibility. But the large incidence of fraud in Chinese cases is known and is recognized, although the fraud in one of a thousand cases is never imputed to other cases, nonetheless, it does form a very substantial and very rational basis for being particularly cautious

Reopened Hearing Before Special Inquiry Officer, Commencing October 28, 1954, Held Following Judge Dimock's Second Decision of September 1, 1954, Reported in 123 F. Supp. 674

in examining and in investigating cases which fall into the same pattern as the Chinese cases which have been demonstrated to be fraudulent, so that the Government's interests will be protected and the Government will not be imposed upon by fraudulent claims.

Before the advent of blood tests and the general use of such tests, the Government was limited almost entirely in resolving the issues which arose in such cases by determining the credibility of the interested witnesses, such as the children and parents who'd be presented to the Immigration Service and whose testimony was the principal basis for the claim of identity and relationship.

By Attorney Gim: (Interposing) Excuse me a minute! This is hearsay and speculative—May I object to all this testimony on the ground of hear say!

Special Inquiry Officer to Attorney Gim: Your objection is overruled.

By Mr. Friedman: Such cases have involved tremendous and unique problems, not the least of which can perhaps be explained as follows: Since the credibility of the witnesses is almost invariably the prime issue, they are necessarily examined extensively concerning their background and family. If their testimony is completely consistent and no discrepancies are developed, it could point to the fact that the case is completely bona fide and that there's no basis for suspecting any fraud, on the

LIBRARY
SUPREME COURT, U S.

Office - Supreme Court, U.S.
FILED
NOV 2 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~515~~ 32

UNITED STATES OF AMERICA, ex rel. LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH,

Petitioners,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD J. ENNIS
Attorney for Petitioner Lee Moon Wah
165 Broadway
New York 6, N. Y.

BEN GIM
Attorney for Petitioners Lee Kum Hoy and Lee Kum Cherk
24 Pell Street
New York 13, N. Y.

CLIFFORD FORSTER
Of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	15
Appendix	1a

Cases:

Avery v. Georgia, 345 U. S. 559	9
Bolling v. Sharpe, 347 U. S. 497	9
Camden Suburban Railway v. Stetson, 177 U. S. 172	12
Chin Yow v. United States, 208 U. S. 8	15
Chin Wing Gwong v. Dulles, 139 F. Supp. 16	15
Ex Parte Lee Dung Moo, 230 Fed. 746	10
Ex Parte Tom Toy Tin, 230 Fed. 747	10
Hernandez v. Texas, 347 U. S. 475	8
Ho Ah Kow v. Noonan, 5 Sawy. 552, 12 Fed. Cas. No. 6546	10
Howland v. Beck, 56 F. 2d 35	12

PAGE

In re Lee Sing, 43 Fed. 359 10
In re Tiburcio Parrott, 1 Fed. 481 10

Jeong Quey How v. White, 258 Fed. 618 10
Judd v. United States, 190 F. 2d 649 13

Lane v. Wilson, 307 U. S. 268 8
Lee Wing Get v. Dulles, 18 F. R. D. 415 13
Lee Wing Hong v. Dulles, 214 F. 2d 753 15
Ly Shew v. Dulles, 219 F. 2d 413 10

Nelson v. United States, 208 F. 2d 505 13
Norris v. Alabama, 294 U. S. 587 ..... 7, 8, 11

Quan Hing Sun v. White, 254 Fed. 401 10
Qwock Jan Fat v. White, 253 U. S. 454 15

Patton v. Mississippi, 332 U. S. 463 7

Rochin v. California, 342 U. S. 165, 25 A. L. R. 2d 1396 13

Schutt v. Commissioner of Motor Vehicles, 205 Misc. 43, 127 N. Y. S. 2d 116 12
Smith v. Texas, 311 U. S. 128 7

Taylor v. Diamond, 241 App. Div. 702, 269 N. Y. S. 799 12

Union Pacific Railroad Co. v. Botsford, 141 U. S. 250 12
United States v. Sully, 56 F. Supp. 942 13

Wong Wai v. Williams, 103 Fed. 1 10
Wong Wing v. United States, 163 U. S. 235 10

Yee Szet Foo v. Dulles, 18 F. R. D. 237 13
Yick Wo v. Hopkins, 118 U. S. 356 ..... 7, 10
Yuen Bob Ming v. United States, 103 F. 2d 355 10

PAGE

Constitutional Provision and Statutes:

U. S. Constitution
Fifth Amendment 9, 11

39 Stat. 885, 8 U. S. C. 152 11

54 Stat. 673, 8 U. S. C. 451, 452 11

8 U. S. C. 102 12

8 U. S. C. 1224 11

8 U. S. C. 1252(d) 12

28 U. S. C. 1254(1) 2

28 U. S. C. 2101(c) 2

Miscellaneous:

Rule 35, Federal Rules of Civil Procedure 13

Schatkin, New York Law Journal, November 20, 1950 14

§306a, New York Civil Practice Act 13

IN THE

Supreme Court of the United States

October Term, 1956

No.

UNITED STATES OF AMERICA, ex rel. LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH,

Petitioners,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on September 25, 1956, one judge dissenting, reversing the judgment of the District Court for the Southern District of New York which had sustained a writ of habeas corpus and discharged the petitioners from custody and admitted them into the United States as citizens thereof (R. 115a-116a).

Opinions Below

The three opinions of the District Court (R. 36a, 55a, 70a) are reported in 133 F. Supp. 850, 123 F. Supp. 674 and 115 F. Supp. 302. The opinion of the court below and the dissenting opinion of Circuit Judge Jerome Frank (App. 10a-17a) have not yet been reported.

Jurisdiction

The judgment of the court below was dated and entered on September 25, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. §§1254(1) and 2101(e).

Questions Presented

1. Whether the court below correctly held that the finding of the trial court that the blood testing of the petitioners was racially discriminatory and was applied only to Chinese persons and not to white persons was not warranted by the administrative record.

2. Whether the court below correctly held that the administrative practice of blood testing all Chinese persons born abroad and seeking to enter the United States as children of American citizens was valid and authorized in the absence of statute or published regulation authorizing this practice.

3. Whether the use of inaccurate and conflicting blood tests in this case denied petitioners due process of law.

Statement of the Case

The petitioners (Lee Kum Hoy, Lee Kum Cherk and Lee Moon Wah), two boys and a girl, being then 22, 13 and 12 years of age, arrived at Ellis Island on June 17, 1952, seeking admission as foreign born United States citizens by virtue of deriving their citizenship from their father, Lee Ha, an American citizen. The petitioners' mother, Wong Tew Hee, a permanent resident alien, had come to the United States in 1949 leaving the petitioners in China to continue their education.

To determine their admissibility the petitioners and their parents were then examined by the Immigration Service at a series of hearings with great particularity as to their home in China, their dwelling house, family

celebrations, identity of neighbors and relatives, and the immigration authorities found that the testimony of all the petitioners and their parents "was reasonably harmonious and reasonably consistent with the records of Immigration and Naturalization Service" (R. 149a, 150a).

Without any authority of any immigration statute or regulation, the petitioners, while under incarceration at Ellis Island, being unable to speak the English language and without being advised of their rights, were taken by an immigration investigator to the Public Health Service on two occasions in July and August, 1952, and were compelled to have blood tests taken (R. 41a, 217a). Their two parents were also directed by the Immigration Service to submit to blood tests (R. 219a). The results of the first blood tests excluded all three petitioners as the possible children of Lee Ha while the second blood test excluded only two of them (R. 136a, 137a, 156a).[1]

At the hearing begun on August 14, 1952 and concluded September 18, 1952 (R. 142a-153a), in the face of the conflicting blood tests but nevertheless in reliance upon them, the Board of Special Inquiry on September 18, 1952 (R. 151a) and the Board of Immigration Appeals on May 11, 1953, affirmed the exclusion of all three petitioners from the United States (R. 154a-160a). The petitioners then sought a writ of habeas corpus which Judge Dimock conditionally sustained for the purpose of enabling petitioners to examine the technicians who took the blood tests and to develop facts concerning the alleged racial discrimination in requiring blood tests of persons claiming entry as United States citizens (R. 36a-53a, 115 F. Supp. 302).

At the reopened Board of Special Inquiry hearing begun on November 5, 1953 and concluded on November 30, 1953 (R. 161a-224a), there was evidence by Dr. Leon Suss-

---

1 These conflicting blood tests are fully set out in District Judge Dimock's first opinion of September 17, 1953 (R. 41a).

man, a recognized blood test expert, that the contradictory blood test reports rendered the tests invalid (R. 168a-179a) and by Dr. George Cameron, Medical Director of the Public Health Service, who supervised the tests in question, that the Public Health Service laboratories were not equipped to handle such tests (R. 210a-216a). The Special Inquiry Officer and the Board, however, adhered to their prior decisions (R. 225a-236a, 237a-273a).

In his second decision of December 1, 1954 (R. 55a, 123 F. Supp. 674) Judge Dimock upheld the use of blood tests but also held that racial discrimination was abhorrent and remanded the proceedings for a full hearing on the issue of discrimination (R. 63a).

At the second reopened hearing, commencing October 28, 1954 and ending December 1, 1954 (R. 274a-381a) the Immigration Service offered the testimony of an Immigration Service attorney[2] who earlier had argued against and prepared the answer and briefs in opposition to petitioners' writ to testify on the Government policy requiring blood tests. He attempted to deny that there was racial discrimination claiming that as of December 1954 there were four recent cases involving blood testing of "non-Chinese" (R. 283a). On cross-examination, however, he conceded that at least two, if not all, probably involved Negroes (R. 356a, 357a). He was unable to cite a single instance since

---

2 In an attempt to furnish a justification for the discriminatory imposition of blood tests upon all Chinese persons, the witness at different stages gave contradictory and inconsistent excuses. When the writ was first brought in July of 1953 he claimed that blood tests were not imposed upon Chinese alone but upon all applicants for admission who did not possess birth certificates to prove relationship and identity to the citizen parent (R. 15a, 332a). Answering this claim petitioners cited two cases of Chinese who were blood tested notwithstanding the possession of birth certificates (R. 26a, 27a). Judge Dimock noted in his second decision that these two cases lent substance to petitioners' claim of discrimination and remanded the case for a new hearing (R. 61a).

the commencement of the blood tests from June 1952 up to and including the time of his testimony on December 10, 1954; wherein a single white person was ever blood tested (R. 357a, 358a) or where a Chinese, regardless of the amount of documentary proof of his claim, was exempted from a blood test (R. 377a, 378a).

At this hearing the Immigration Service's witness for the first time minimized the birth certificate factor, claiming that it "was only one of the many criteria for determining whether or not blood test evidence should be required" (R. 328a, 285a). The principal and most important criterion of long standing exempting blood tests (R. 311a, 286a) he said, was whether the person seeking admission was born in an area wherein an American Consul was located who could then conduct an investigation and verify from neighbors, friends and local government officials his claim of relationship and identity (R. 328a, 286a). On cross-examination, the witness admitted that this factor of a consular investigation had neither been mentioned in the return to the writ he prepared (R. 11a-19a) nor in the Government's brief, the Government's excuse for blood testing Chinese being solely their alleged lack of birth certificates with no mention as to the unavailability of a consular investigation as the determining factor (R. 332a, 333a, 338a).

In support of their claim that all Chinese as a class were blood tested, regardless of whether or not they had birth certificates or whether or not they were born in an area wherein a consular investigation was possible, the petitioners introduced five examples (Exhibits 27-30, R. 353a-356a, 74a-76a). In each of these cases the applicant was a Chinese child who had never been to China, was born in Hong Kong and possessed a British birth certificate and whose parents were married, had a British birth certificate and were living in Hong Kong. In addition, and most important, each child had always lived in Hong Kong wherein a large American Consular staff is employed and thorough investigation was possible and in fact was conducted. Nev-

ertheless, in each one of these cases, the Immigration Service required blood tests.

On January 18, 1955 the Special Inquiry Officer found no discrimination in the application of blood tests (R. 382a-391a) and the Board of Immigration Appeals affirmed on May 5, 1955 (R. 392a-401a). On the basis of this hearing and on the record covering two earlier administrative hearings, three appeals to the Board of Immigration Appeals, and three full hearings before the District Court, Judge Dimock ruled that the policy of the Immigration Service was to "apply blood tests to all Chinese and to no whites" (R. 71a) and that such racial discrimination was an unconstitutional denial of due process of law. He thereupon sustained the writ (R. 69a-77a, 133 F. Supp. 850).

After Judge Dimock's decision the Immigration Service moved for reargument (R. 78a) claiming for the first time that commencing January 10, 1955 there were 60 instances of blood tests given to white persons. There was also a claim that there were 40 cases of Chinese admitted to this country prior to June 16, 1952 who were not blood tested (R. 91a-99a), but these admissions were prior to the period when blood tests were officially commenced. Petitioners pointed out that blood testing of 60 white persons beginning January 1955 did not excuse retroactively racial discrimination against the petitioners in 1952 (R. 113a). Judge Dimock denied the motion without opinion (R. 115a-116a). The Court of Appeals, Circuit Judge Frank dissenting, reversed Judge Dimock's decision and held that the finding of discrimination was not warranted; that the Immigration Service was actuated by a police motive rather than racial discrimination; and that the Immigration Service officers had not consciously adopted a racially discriminatory policy toward Chinese.

Reasons for Granting the Writ

1. *A racially discriminatory practice was clearly proved.* —The District Court, as Circuit Judge Frank states in his dissenting opinion in the court below (App. 10a-17a), correctly held that the evidence established that the petitioners were subjected to a racially discriminatory blood testing practice by the Immigration and Naturalization Service under which all Chinese persons and no white persons were blood tested (R. 76a-77a, 133 F. Supp. 850, 854). Such a record requires the application of the rule adopted by this Court in *Yick Wo* v. *Hopkins*, 118 U. S. 356. See also *Norris* v. *Alabama*, 294 U. S. 587, 589; *Smith* v. *Texas*, 311 U. S. 128, 130-131; *Patton* v. *Mississippi*, 332 U. S. 463, 465-466.

The trial court found (R. 76a, 133 F. Supp. 854):

> "They [petitioners] made an affirmative showing of paternity that would have been sufficient but for the requirement that they submit to blood tests. They have been excluded. Members of the white race in exactly the same position are admitted. The Chinese and white persons thus differently treated constitute a single class but for their color. The Chinese of this class are excluded and the whites admitted. That constitutes a deliberate strict enforcement of the immigration laws in the case of Chinese and a deliberate loose one in the case of whites. As I stated in *U. S.* v. *Shaughnessy, supra*, 123 F. Supp. 674, at pages 677-678 [R. 62a] such a practice violates the Constitution."

The Court of Appeals reversed this specific finding of the trial court even though it was based on virtually uncontradicated and compelling evidence and even though the Court of Appeals expressly recognized in its opinion that "there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any non-Chinese cases or of Chinese admitted without blood testing"

(App. 7a).[3] The Court of Appeals based its decision on this point wholly upon the following (App. 7a-8a):

> "Nevertheless we think it more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult cases."

The Court of Appeals sought to support its view that the blood testing of all Chinese but no white persons between 1952 and 1954 was done in pursuit of a proper police motive rather than in the exercise of racial discrimination by statements that there was no evidence that in a particular case a particular officer "was actuated by racial prejudice" and that even if occasional prejudice was proved "it does not follow that officers responsible for policies of the Service had consciously, in 1952, adopted a discriminatory policy." (App. 9a) The petitioners submit that the views of the Court of Appeals reversing the trial court's finding on this reasoning violated rulings of this court in important respects and should be reviewed.

A. The conscious racial prejudice of a particular officer is not the test of a discriminatory practice. This Court in *Hernandez* v. *Texas*, holding unconstitutional Texas' policy to exclude persons of Mexican descent from the jury system (347 U. S. 475, 482) said,

> "But it taxes our credulity to say that mere chance resulted in there being no members of this class among

---

3 This Court is not bound by the view of the facts adopted by the court below on the fundamental constitutional issue of a racially discriminatory practice. *Lane* v. *Wilson*, 307 U. S. 268; *Norris* v. *Alabama*, 294 U. S. 587.

the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner."

As the trial court found, the evidence established a practice of discrimination and the consciousness of racial prejudice by particular officers concerned is not a material factor in the proof of discrimination if the net result is that all Chinese and no white persons were blood tested. The result is discrimination which should be condemned by this Court as in violation of its decisions.

B. A conscious adoption of a racially discriminatory practice by policy officials of the Service is not the test. The petitioners proved they were subjected to an established practice of blood tests on the basis of race. They were not required to prove whether the "policy-makers" consciously adopted the practice although the evidence of the invariable practice admittedly in over five hundred Chinese cases and in no white cases inevitably did establish approval of the practice by the policy-makers. *Avery* v. *Georgia*, 345 U. S. 559, at 562, 563. The Fifth Amendment due process prohibition against racial discrimination (*Bolling* v. *Sharpe*, 347 U. S. 497) cannot be restricted by some doctrine of *non respondeat superior*.

C. The Court of Appeals stated that it affirmed substantially upon the grounds stated in the last decisions of the Special Inquiry Officer (R. 382a-391a) and of the Board of Immigration Appeals (R. 392a-401a) that on the whole administrative record discrimination was not proved (App. 7a). But these administrative decisions did not deny the fact that for over a two year period, 1952-1954, all Chinese and no white persons were blood tested but rather defended the discriminatory practice by asserting that blood testing had to start somewhere and in the future would not be limited to Chinese (R. 390a, 399a). The petitioners might concede that if Chinese merely

happened to be involved in the first cases which arose under a new blood testing procedure applicable and applied to all, regardless of race or color, a charge of racial discrimination might not be proved. But this defense of the practice offered by the Board of Immigration Appeals and the Special Inquiry Officer and accepted by the Court of Appeals does not meet the evidence and the specific finding of the trial court that from the first hearing on August 14, 1952 (R. 123a) until the last hearing on December 10, 1954 (R. 306a) the Service was unable to produce one instance in this period of approximately two and a half years in which a white person had been blood tested (R. 357a) or a Chinese person had not been blood tested (R. 377a). Such a record inescapably shows not merely a non-discriminatory practice which happened to commence with Chinese cases but rather a deliberate established racially discriminatory practice applied to all Chinese and to no white persons.

D. Finally, it is submitted that petitioners in this case satisfied the difficult burden of proving a racially discriminatory practice although the Service consistently refused to make its records available to petitioners who sought to prove the facts contained in those records (R. 302a, 320a, 324a). This is not the first instance in which racial discrimination against Chinese in the application of the immigration laws or regulations[4] or other laws and regulations[5] has been judicially established. It is difficult to conceive a state of facts, short of an admission by the

---

4 See *Ly Shew* v. Dulles, 219 F. 2d 413 (C. A. 9); *Yuen Boo Ming* v. *United States*, 103 F. 2d 355 (C. A. 9); *Jeong Quey How* v. *White*, 258 Fed. 618 (C. A. 9); *Quan Hing Sun* v. *White*, 254 Fed. 402 (C. A. 9); *Ex parte Tom Toy Tin*, 230 Fed. 747 (N. D. Cal.); *Ex parte Lee Dung Moo*, 230 Fed. 746 (N. D. Cal.).

5 See *Wong Wing* v. *United States*, 163 U. S. 235; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Wong Wai* v. *Williamson*, 103 Fed. 1 (C. C. N. D. Cal.); *In re Lee Sing*, 43 Fed. 359 (C. C. N. D. Cal.); *In re Tiburcio Parrott*, 1 Fed. 481 (C. C. D. Cal.); *Ho Ah Kow* v. *Noonan*, 5 Sawy. 552, 12 Fed. Cas. No. 6546 (C. C. Cal.).

Service, which would more plainly show a racially discriminatory procedure. Despite the usual claim of privilege for all of the Service's operation instructions and records under which the blood testing was conducted, the petitioners did succeed in proving, and the trial court correctly found, that petitioners were blood tested pursuant to a racially discriminatory practice. If such evidence and such a factual determination of the trial court can be nullified by the reasoning of the administrative decisions adopted by the Court of Appeals it is difficult to perceive how a Chinese person claiming United States citizenship can ever prove a state of facts entitling him to invoke the protection of the Fifth Amendment against a racially discriminatory procedure. Cf. *Norris* v. *Alabama*, 294 U. S. 587, 598.

2. *Blood tests not authorized by statute or regulation are unlawful.*—Both the trial court (R. 58a) and the Court of Appeals (App. 6a-7a) held that the immigration officials had the authority to require blood tests of applicants for admission to the United States as citizens even in the absence of statute or regulation authorizing blood tests. The petitioners submit that in the absence of express or implied Congressional authority blood tests, which involve an intrusion on the person of an individual, are unlawful.

A. Both the 1917 immigration statute, applicable when petitioners were blood tested in 1952, and the present Immigration and Nationality Act are explicit and detailed in respect of authority for physical examinations. Section 16 of the 1917 Act (39 Stat. 885, 8 U. S. C. 152) provided for medical examination of arriving aliens by medical officers of the United States Public Health Service to determine any physical or mental defects subjecting applicants to exclusion. Sections 30 and 31 of the Alien Registration Act of 1940 (54 Stat. 673, 8 U. S. C. 451, 452) provided for fingerprinting aliens applying for admission. Section 234 of the present Act of 1952 (8 U. S. C. 1224) provides for physical and mental examinations of aliens, and §242(d)

(8 U. S. C. 1252(d)) goes further and requires aliens subject to final orders of deportation to submit to medical and psychiatric examinations. The petitioners submit that these express provisions for physical examinations and fingerprinting but not for blood tests strongly imply that Congress has not authorized blood tests. The failure of the Commissioner of Immigration and Naturalization to issue a regulation under the general authority of §23 of the 1917 Act (8 U. S. C. 102) is some indication of an official belief that such a regulation was not authorized by the statute.

The record indicates that the discriminatory blood testing of Chinese was instituted without regulation by zealous investigators (R. 316a, 386a).[6] It is submitted that such a practice as blood testing, not authorized by statute or regulation, is invalid.

B. This conclusion that blood testing is not authorized is supported by persuasive analogous judicial precedents which hold that in the absence of express statutory authority blood testing is not even within the independent judicial power of a court charged with the duty of determining paternity. *Taylor* v. *Diamond*, 241 App. Div. 702, 269 N. Y. S. 799 (2nd Dept.). See also *Schutt* v. *Commissioner of Motor Vehicles*, 205 Misc. 43, 127 N. Y. S. 2d 116. Even a federal court in the absence of explicit statutory authority lacks power to compel a person to submit to a physical examination. *Union Pacific Railroad Co.* v. *Botsford*, 141 U. S. 250; cf. *Camden Suburban Railway* v. *Stetson*, 177 U. S. 172; *Howland* v. *Beck*, 56 F. 2d 35 (C. A. 9). *A fortiori* administrative officials exercising only power delegated to them by Congress have no such authority in the absence of statute.[7]

---

6 The Service refused to produce the Operation Instructions which apparently after the practice commenced made reference to blood testing Chinese persons (R. 316a).

7 In judicial proceedings, unlike the administrative proceeding under review here, authority for blood tests under protection of a

The court below did not consider in its opinion the contention of the Service that petitioners voluntarily submitted to the blood tests and thus waived any objection to the discriminatory practice. The trial court in its third opinion (R. 70a-77a), holding the discriminatory procedure unconstitutional, did not refer to the Service's contention that the blood tests were voluntary (R. 13a). The trial court in its second opinion states that the blood tests were administered as a matter of course and that none of the subjects made objection (R. 57a). The facts are that the petitioners, while in detention and separated from their parents and unable to speak or understand English, were escorted by an immigration officer to the hospital connected with the detention station and were not advised that they were to be blood tested or the purpose of the trip or the purpose of the blood tests. They were not told that they had any choice in the matter (R. 217a-218a). The petitioners' father testified that the parents did not volunteer to take a blood test but were informed by the Government officials that they had to have blood tests (R. 219a). There is no suggestion in the record that the parents were requested to submit the petitioners voluntarily to blood tests. On this record it cannot be maintained that the blood tests were voluntary. The salutary judicial rule is that a voluntary waiver of a constitutional right will not be implied from ambiguous circumstances, and certainly not from an orderly submission to the direction of Government officers. *Judd* v. *United States*, 190 F. 2d 649 (C. A. D. C.); *Nelson* v. *United States*, 208 F. 2d 505 (C. A. D. C.); *United States* v. *Sully*, 56 F. Supp. 942 (S. D. N. Y.); cf. *Rochin* v. *California*, 342 U. S. 165, 25 A. L. R. 2d 1396.

3. *The use of inaccurate and conflicting blood tests denied the petitioners due process of law.*—The Court of

---

court order is found in Rule 35 of the Federal Rules of Civil Procedure and §306a of the New York Civil Practice Act. *Yee Szet Foo* v. *Dulles*, 18 F. R. D. 237 (S. D. N. Y.); *Lee Wing Get* v. *Dulles*, 18 F. R. D. 415 (S. D. N. Y.).

Appeals in its opinion did not refer to petitioners' contention that their exclusion from the United States as aliens solely on the basis of inaccurate, conflicting and scientifically discredited blood tests was denial of due process of law (R. 120a). The trial court in its first opinion reviewed the blood tests and concluded that their "accuracy was clouded in doubt and uncertainty by the inconsistency between the two sets, if by nothing else" (R. 47a). The court also concluded that all of the evidence but the blood tests indicates that the petitioners are the children of an identified American citizen (R. 38a). The trial court in its second opinion stated that there was enough evidence to exclude the petitioners if the blood test testimony was included (R. 56a, 76a) but sustained the writ conditionally because of the failure of the administrative officials to consider evidence of discrimination (R. 63a). The holding in the trial court's final opinion that the blood testing procedure was unconstitutional made it unnecessary to refer to or rely upon the accuracy of the blood tests.

The petitioners submit that the denial of their American citizenship and their exclusion was unconstitutional because both of the experts who testified, Doctors Cameron and Sussman, repudiated the blood tests in this case as any satisfactory basis for determination of paternity (R. 178a, 215a-216a).[8] The experts are unanimous that blood tests should be relied upon to exclude paternity only if there does not exist the slightest possibility of paternity.[8]

Due process requires that the denial of petitioners' citizenship must be based on substantial evidence. *Qwock Jan*

---

8 In Schatkin, "Disputed Paternity Decisions," New York Law Journal, November 20, 1950, it is stated:

> "If there exists the slightest possibility of paternity the serologist will report 'no exclusion.' If there is one chance in, say, 200 that the accused is the father of the child, there is no exclusion. If there is one chance in, say, 200 that the accused may be the father and 200 chances to one that he is not the father, there is no exclusion."

Fat v. *White*, 253 U. S. 454, 464; *Chin Yow* v. *United States*, 208 U. S. 8. The blood tests are considered together with all the other evidence and are not conclusive. *Lee Wing Hong* v. *Dulles*, 214 F. 2d 753 (C. A. 7); *Chin Wing Gwong* v. *Dulles*, 139 F. Supp. 116 (D. R. I.). In view of the completely unreliable character of the blood tests in this case there was no substantial evidence to sustain the determination against the petitioners.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. ENNIS
Attorney for Petitioner Lee Moon Wah

BEN GIM
Attorney for Petitioners Lee Kum Hoy and Lee Kum Cherk

CLIFFORD FORSTER
Of Counsel

October 31, 1956

APPENDIX

Opinion of the Court of Appeals

Before:

CLARK, *Chief Judge*,
and FRANK and HINCKS, *Circuit Judges*.

HINCKS, *Circuit Judge*:

This is an appeal from an order in a habeas-corpus proceeding in which the relators are three Chinese-born minors claiming admission to the United States as citizens by derivation from one Lee Ha, concededly an American citizen, alleged to be their father. The respondent is the District Director of the New York District of the Immigration and Naturalization Service.

The putative father, who sued out the writ, came to the United States as a derivative citizen in 1926. He returned to China for a visit in 1929 and again visited China in 1938 for a period of 16 months. The relators, it is claimed, were begotten during these periods; Lee Kum Hoy being born in 1930, Lee Kum Cherk in 1939, and Lee Moon Wah in 1940. In 1949 the wife came to this country, and in 1952 the relators arrived. Lee Ha testified that prior to their arrival he had sent from this country substantial contributions to the support of his children in China but was unable to furnish any documentary evidence of the transmission of such funds.

The original immigration hearing was held on August 14, 1952. The Board of Special Inquiry examined the relators and their parents with great particularity as to their village home in China, their dwelling house, various family celebrations, their neighbors and their relatives. The Board found that this testimony was "reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service."

Shortly prior to this hearing, two blood grouping tests of the entire family had been made. The results of the tests were put into evidence at the hearing and objected to by the relators. Although conflicting in some particulars, the data common to both tests established conclusively that Lee Ha could not be the father of two of the relators. Since the children all swore that they were brothers and sisters, the Board of Special Inquiry found that Lee Ha could not be their father and ordered all three excluded from the United States. The Board of Immigration Appeals supported the decision treating the blood tests as convincing evidence of non-paternity.

A writ of habeas corpus then issued followed by three successive hearings before the District Court. In the first of these the relators claimed that use of the blood test evidence deprived them of due process of law because they were not allowed to cross-examine the blood-test technician and because the tests were discriminatorily administered to all Chinese, and no whites. Judge Dimock held that the right to cross-examine the technicians had been improperly denied and, without passing on the claim of discrimination, remanded for rehearing before the Board of Special Inquiry, 145 F. Supp. 302. An adverse decision by the Immigration Service again brought the relators before Judge Dimock. This time he held that the blood test evidence had been properly received if the tests had been taken without undue discrimination but feeling that the evidence on the issue of discrimination was inconclusive he ordered another rehearing on that issue, 123 F. Supp. 674. After the Immigration authorities again ruled against the relators, Judge Dimock, in his third opinion, reported at 133 F. Supp. 850, found that the blood tests were administered to all Chinese and to no whites, and held that this was illegal discrimination. Accordingly, he sustained the writ and ordered the relators to be admitted as citizens of the United States.

From this order, the respondent appeals. The relators by their cross-appeal predicate error on Judge Dimock's ruling in his second decision that even without the sanction

of statute or official, authorized, regulations the Immigration Service may make use of blood testing as a method of non-discriminatory investigative procedure.

At the administrative hearings evidence relative to the claim of anti-Chinese discrimination was developed as follows. When American Consulates in China were closed, the Consulate in Hong Kong was flooded with passport applications by those theretofore living in the interior of China. The State Department then began taking blood tests in Hong Kong as a check on claims of paternity. The results of the tests having there proved useful as an investigative device, the procedure was adopted on an informal basis by individual investigators of the Immigration Service in its examination of Chinese arrivals beginning at some time, not precisely identified, in 1952. Between June 1952 and November 1953, at the request of the Immigration Service, 200 Chinese were blood tested by the Health Service, pursuant to a Federal Security Agency circular authorizing it to test United States citizens of Chinese descent. The Immigration Service also referred Chinese claimants to private physicians to make blood tests, one of whom testified that between early 1952 and November 1953 he tested 300 Chinese and no whites. To refute the respondent's contention that such tests were required of Chinese only in cases in which a birth certificate and opportunity to make a local investigation of paternity were absent (as was generally true of those born and raised in the interior of China), the relators put in evidence proof of four cases of Hong Kong Chinese, who had birth certificates issued by the British government or the American Consulate in each of which blood tests had been requested. In three of these cases the request for blood tests was made between July 24, 1952 and June 2, 1954.

The first formal authority for the use of blood tests was contained in a precedent decision of the Board of Immigration Appeals handed down on February 25, 1953. The Immigration Service first promulgated instructions relating to blood tests in early 1953. The early instructions dealt

only with visa petitions and certificates of citizenship: they did not directly or indirectly purport to apply to exclusion proceedings. While the early directives did mention the use of blood tests specifically in Chinese visa petition cases and applications for certificates of citizenship, those instructions at no time directed the use of blood tests exclusively in Chinese cases and at no time precluded the use of blood tests in non-Chinese cases.

More recently, some time in 1954, all of those instructions were rescinded and all current instructions concerning the investigation techniques with respect to cases wherein blood tests are deemed essential or necessary do not directly or indirectly refer to any racial or nationality group but predicate the requirement on the nature of the case and the issue of paternity or the relationship which is involved. No instruction of any kind as to Chinese or other persons has been issued with respect to exclusion hearings before Special Inquiry Officers.

The respondent, in an effort to show the blood testing of non-Chinese, pointed to four cases of testing in the 1952-1953 period but none of these were definitely identified as involving persons of non-Chinese extraction. The respondent offered as a witness an Attorney-Advisor in the office of District Counsel for the New York office of the Immigration and Naturalization Service who since 1941 had experience in the Service as a Naturalization Examiner and chief of the Status Section. Since 1946 he had been assigned to that office as Attorney-Advisor in which capacity he had had first-hand knowledge of all policy decisions and had participated in thousands of litigated cases, including cases involving evidence of citizenship involving Chinese persons. He testified that Chinese cases in the large fell within the general pattern described in *Mar Gong* v. *McGranery*, 109 F. Supp. 821 (S. D. Cal. December 15, 1952),* and that a

---

That case was reversed and remanded on appeal. *Mar Gong* v. *Brownell*, 9 Cir., 209 F. 2d 448. However, the appellate decision held only that fraud in other cases was not a proper factor to con-

high incidence of fraud had been developed in the cases falling within that general pattern.** He testified further as follows. The Service had discovered that in bringing Chinese-born children to the United States there had developed a practice to prepare coaching books or "Halgoons", comprising an extensive written summary of family background reciting alleged details of family life, village, neighbors, schooling and local geography, which the alleged members of the family memorize and use as the basis for the answers to the questions asked of them severally, thus avoiding inconsistencies and concealing evidence of fraud which might otherwise develop on their respective examinations. The complicated structure of the Chinese calendar, the similarity of humble Chinese homes and villages as well as the Chinese language were unique factors which added to the difficulty of testing the credibility of witnesses in Chinese cases by separate examination as to the detail of significant family dates and abodes. This witness further testified:

> "* * * As a matter of fact, it has been my experience that a substantial, if not the major proportion of all Chinese children arriving in the United States are admitted to the United States on [illegible]imary inspection because no doubt exists as to their admissibility. But the large incidence of fraud in Chinese cases is known and is recognized, although the fraud in one of a thousand cases is never imputed to other cases, nonethe-

---

sider in making a judicial finding as to the alleged citizenship involved in a particular case such as the case there at bar. The opinion did *not* suggest that knowledge of frauds attempted in cases of a similar pattern might not be considered for its bearing on the scope of investigation appropriate in the particular case. Indeed, blood testing was involved in the *Mar Gong* case.

** The administrative record, however, contained no evidence of the comparative incidence of fraud in Caucasian, or non-Chinese, cases involving the issue of paternity. It suggests at most, that only a small proportion of the non-Chinese cases fell within the range of the Chinese pattern described in 109 F. Supp. 821.

> less, it does form a very substantial and very rational basis for being particularly cautious in examining and in investigating cases which fall into the same pattern as the Chinese cases which have been demonstrated to be fraudulent, so that the Government's interests will be protected and the Government will not be imposed upon by fraudulent claims."

He testified further:

> "For this reason, when the use of blood tests on such issues first came to the attention of the Immigration authorities, it was seized upon as one of the first genuinely, tangible methods of reaching the truth. It is the position of the Immigration Service that the use of blood tests under such circumstances is not discriminatory—but is necessary, by reason of the pattern and type of case!—and not because the persons involved happen to be of the Chinese race."

The respondent's witnesses categorically denied that racial discrimination in the use of blood tests had ever existed and attributed the number of Chinese tested in the 1952 period to a proper police motive on the part of individual investigators adequately to investigate cases which seemed suspicious against their current background, evaluated by the actual experience of those responsible for the enforcement of the applicable law. Their testimony showed that at a later period an increasing number of non-Chinese were blood tested.

We agree with the relators that this case is not governed by our former decisions in *Lue Chow Kon* v. *Brownell*, 2 Cir., 220 F. 2d 187, and *Dong Wing Ott* v. *Shaughnessy*, 2 Cir., 220 F. 2d 537. The evidence of discrimination here is substantially more compelling than that before us in those cases. However, we do not recede from our holding in those cases that blood tests, if not taken because of discrimination on racial grounds, are competent evidence on

the issue of paternity, at least in federal courts sitting in the State of New York. We overrule the relators' contention, raised by their cross-appeal, that evidence of the blood tests was improperly received because of lack of administrative authority to make use of blood tests. Even in the absence of express authority embodied in official rules or directives, we hold that in the situation here responsible official personnel had authority to utilize any non-discriminatory, investigatory technique reasonably appropriate. The ruling complained of is sustained and the order complained of by the cross-appeal is affirmed.

We hold further that on the entire administrative record, only the salient portions of which are set forth above, the finding below that the testing of these relators was actuated by racial discrimination, was not warranted. It is true that in the 1952-1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any non-Chinese case or of Chinese admitted without blood testing.* Nevertheless we think it

---

* After the entry of the order below, the respondent moved to reopen to permit additional evidence to be taken by the court. The motion was supported by an affidavit made by an Investigator of the Naturalization Service detailed to investigate cases involving possible frauds perpetrated by persons of the Chinese race in connection with their admission to the United States. His affidavit recited, *inter alia*, that an examination of cases in the New York office of the Service made at the request of respondent's counsel disclosed a list, appended as Exhibit A, of 60 cases, each identified by file number, of white persons who had been blood tested between January 10, 1955 and August 4, 1955, and another list, appended to his affidavit as Exhibit B, comprising 124 Chinese-born persons admitted between March 31, 1952 and June 2, 1952, of which 40 had not been blood tested.

This motion for a reopening was denied without opinion or comment. We think it plain that the facts thus sought to include in the record, if established after proper cross-examination, would have had some substantial weight to refute the evidence indicative of racial discrimination. It is true that the blood testing of whites in 1955 does not fully demonstrate the absence of anti-Chinese discrimination in 1952. But even so it is a factor which would make it more reasonable to attribute the absence of blood testing for whites in 1952 to the administrative difficulty of immediately ex-

more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult cases. As the Special Inquiry Officer pointed out in his opinion, the technique of blood tests to check claims of paternity was a new procedure which originated in the American Consulate in Hong Kong whence it spread to the Immigration Service. We agree with him that discrimination did not result because in less than two years it was not immediately adopted in every case. We affirm substantially on the grounds stated in the last "decisions" of the Special Inquiry Office and the Board of Immigration Appeals, being satisfied that on the whole the administrative record supported the conclusion reached therein, viz., that discrimination had not been proved. Cf. *Tulsidas* v. *Insular Collector*, 262 U. S. 258; *O'Connell ex rel. Kwong Han Foo* v. *Ward*, 1 Cir., 126 F. 2d 615.

Certainly, there was no evidence that in any other particular cases the particular investigating officer or Special Inquiry Officer involved was actuated by racial prejudice either in requesting blood tests or in processing the case without blood tests: so far as the direct evidence shows the scope of investigation in every case processed was adjusted to accord with doubts as to the bona fides of the applicant's claimed paternity and to the availability of local sources of information at the applicant's foreign residence. And even if, contrary to our view, occasional prejudice on the

---

panding a newly utilized investigating technique which happened to begin with Chinese-born entrants to cover entrants of all other national extractions. Perhaps the motion was denied because deemed untimely; perhaps because the judge below thought that the evidence proffered, even if received, would not alter his finding of discrimination. In view of our contemplated disposition of this appeal, we do not need to pass upon the propriety of that ruling.

part of individual officers of the Service were deemed proved by inference arising from the preponderance of Chinese cases among those blood tested, it does not follow that the officers responsible for the policies of the Service had consciously, in 1952, adopted a discriminatory policy. Surely the policy-makers were not under duty to re-examine cases disposed of with or without administrative appeal, apparently on a factual basis, in a search for an undisclosed discriminatory motive on the part of the particular officers, or to keep elaborate and expensive statistics classifying each case for its race and nationality, and developing the particular reasons which had determined the scope of the investigation made by the individual investigators. The evidence showing that no such statistics were currently accumulated, warrants no inference to bolster the relators' case on the issue of discrimination. Rather, we think, it tends to betoken that in 1952 the Service was not even race-conscious in the formulation of its investigative policies. It also furnishes a reasonable explanation for the respondent's difficulty and occasional inconsistencies (too much stressed below) in attempting for purposes of the reopened hearing of October 28, 1954 to determine and synthesize into a general pattern the evanescent reasons on which individual officers had shaped the scope of numerous investigations made two years before.

In our judgment, the four cases of Hong Kong Chinese, earlier adverted to, of applicants who were blood tested although possessed of birth certificates issued by the American Consulate, are not enough to impugn the administrative conclusion. At most, those cases are of slight weight in showing the then existence of racial discrimination and certainly are not conclusive of discrimination against these relators.

The respondent's appeal is reversed with a direction to dismiss the writ. Affirmed on the cross appeal.

FRANK, *Circuit Judge* (dissenting as to respondent's appeal):

I concur in the affirmance on relators' cross appeal. As to respondent's appeal, I dissent, for the reasons stated by Judge Dimock in his opinions reported in 123 Fed. Supp. 674[1] and 133 Fed. Supp. 850.[2] I shall not repeat in detail

---

[1] In 123 F. Supp. 674, 677-678, Judge Dimock said:

"Relators allege deliberate use of the blood test technique to exclude Chinese and admit others similarly qualified except for race. This result is reached, they say, because the application of the blood tests to Chinese and not to others constitutes more stringent enforcement of the immigration laws against Chinese than against others. Chinese persons, they say, are always subjected to the rigorous inquisition of a blood test while others, no matter how inconclusive may be the other evidence, are never subjected to a blood test. If such a deliberate use of the blood test technique to exclude Chinese exists, the discrimination against Chinese is clear even though the result may be to allow the admission of unqualified non-Chinese rather than to prevent the admission of qualified Chinese. It makes no difference that the complaint of the Chinese is against a failure to go to the full extent of the law in the case of non-Chinese rather than against going beyond the law in the case of Chinese. A minority could be as effectively persecuted by enforcing a law against them alone as by acting against them without warrant of law. Racial discrimination is abhorrent to our institutions. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; *Hirabayashi* v. *U. S.*, 320 U. S. 81, 100, 63 S. Ct. 1375, 87 L. Ed. 1774; *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693."

[2] In 133 F. Supp. 850, 854, Judge Dimock said:

"The worst that can be assumed is that these three Chinese children sought admittance to the United States upon a false claim of paternity. They made an affirmative showing of paternity that would have been sufficient but for the requirement that they submit to blood tests. They have been excluded. Members of the white race in exactly the same position are admitted. The Chinese and white persons thus differently treated constitute a single class but for their color. The Chinese of this class are excluded and the white admitted. That constitutes a deliberate strict enforcement of the immigration laws in the case of Chinese and a deliberate loose one in the case of whites. As I stated in *U. S.* v. *Shaughnessy*,

his statement of the evidence or his reasoning. I think the record amply justifies his conclusion (133 Fed. Supp. at 852) that, "It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The Government has been unable to point to a single instance where a white person had been subjected to a blood test or a Chinese excused from one." Judge Dimock seems to me to show, unanswerably, that we have here an unconstitutional administration of a valid statute.[3]

He carefully pointed out how the government, in the several stages of the hearings before him, kept shifting its position in a way which warranted his distrust of its protestations of an absence of discrimination.[4] On the third

---

supra, 123 F. Supp. 674, at pages 677-678, such a practice violates the constitution. See, besides the cases there cited, *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873; *Mar Gong* v. *Brownell*, 9 Cir. 209 F. 2d 448; *Lau Hu Yuen* v. *U. S.*, 9 Cir. 85 F. 2d 327."

[3] See, e.g., *Yick Wo* v. *Hopkins*, 118 U. S. 356.

[4] In 133 F. Supp. at 852-853, Judge Dimock said:

"In July of 1953, when charges of racial discrimination against the Chinese in blood tests were first made in relators' application for a writ of habeas corpus, the government denied that Chinese were singled out for such tests and claimed that blood tests were required in all cases where there were no birth certificates or other documents of identity. Thus, in the Government brief, it was stated that blood tests were not imposed upon Chinese persons alone, but upon 'all persons attempting to enter the United States without birth certificates and similar documents.' Similar statements were contained in several subsequent government affidavits to the effect that blood tests were required only in those cases where there was an absence of birth certificates and other documentary evidence of identity.

"In answering this argument of the government, relators cited two cases where Chinese persons were blood tested notwithstanding the fact that they had birth certificates. This was noted by me in my decision at 123 F. Supp. 674, 677, *supra*, where I said that these two cases lent substance to the claim that Chinese, regardless of the availability of birth cer-

administrative hearing (held pursuant to Judge Dimock's opinion reported in 123 Fed. Supp. 674) respondent introduced the testimony of an Attorney-Advisor in the New York office of the Service. This testimony was designed to rebut the strong case of discrimination theretofore made by relators. This witness narrated instances purporting

---

tificates or other documents, were always subjected to a blood test while other persons never were.

"In the reopened hearing following that decision, the Immigration Bureau witness sought to minimize the importance of birth certificates in determining whether a blood test was necessary, stating that it was 'only one of the many criteria' for determining whether a blood test was needed in a particular case. According to the witness there are three common patterns of children of American citizens born abroad who apply for admittance to the United States as citizens. The first involves an American child in an 'American colony' abroad, whose parents keep in close touch with the Consulate, and where the births and marriages would be registered at the Consulate. The second pattern, which, like the first, is not the usual pattern for Chinese children, would be where the American parent is not known to the Consulate, but where birth and marriage certificates are produced to substantiate the claim and, most important, the children involved are born in an area where the Consul could speedily conduct an investigation and ascertain from neighbors, friends and local government officials, the true identity of the child.

"In the foregoing two patterns of cases, the witness stated 'there would be no need for using blood test evidence to verify an obvious relationship.' The third type of situation was one which he said was typical of Chinese. This was where the child was born in the remote interior of China, where no birth or marriage certificates were kept, and, most important of all, the claimed area of birth was inaccessible to the Consul and hence where he could not conduct any investigation as to the circumstances of the child's birth. The witness then concluded and reaffirmed on cross-examination that the most important factor in determining whether a blood test would be required is whether a child is born in an area where the American Consul can readily conduct an investigation. He said that, if the Consul could verify the identity of the child involved from his investigation, by talking to neighbors, friends and local officials, there would be no need for a blood test.

"Although the witness testified that 'the most important criterion for determining the necessity of a blood test—namely,

to prove absence of discrimination, and added his impressions of the administrative practices. Relators were denied the opportunity to see the administrative records to which this witness had referred. The witness conceded, on cross-examination, that his testimony was inconsistent with statements previously made by him in the return to the writ of

---

the ability of the consulate to investigate the area of a person's birth—had been a factor in immigration investigations which antedated by a long time the use of blood tests, he admitted that, in the government brief filed when this case was first argued, there was no mention at all of this 'most important' criterion. Similarly, in the subsequent government affidavits filed prior to the issuance of my decision, the Immigration Service had stated specifically that blood tests were required in cases where there were no birth certificates or documentary evidence, and there was no mention whatsoever of the feasibility of a consular investigation as being determinative of whether blood tests were necessary.

"To show that Chinese persons claiming a right to enter the country as children of United States citizens are always required to submit to blood test, irrespective of how satisfactory their other proof as to identity was and regardless of whether they were born in an area where a consular investigation was possible, relators cited several cases as examples.

"Exhibit No. 27 involved L-L the son of L-H, an American citizen of Chinese descent. L-L was born in Hong Kong, and produced a contemporaneous official birth certificate issued by the British government to prove his identity. This certificate stated the names of his parents and the place and date of his birth. In addition, the parents of L-L, having been married in Hong Kong, produced a marriage certificate. Most important, the son and mother were living in Hong Kong, and an investigation by the American Consul there was thoroughly feasible, and in fact conducted. Nevertheless, L-L, a child only a year and a half old at the time, was subjected to a blood test along with his father and mother.

"Exhibit No. 28, involves Ng Ho Gim, an American citizen of Chinese descent, who petitioned for his six year old son who was living in Hong Kong with his mother. His son was born in Hong Kong and his birth was registered at the American Consulate which issued a certificate verifying the birth of the child and the marriage of the parents. Notwithstanding the American Consulate's own certificate acknowledging the identity of the child and the fact of his parents' marriage, and in spite of the fact that the child was living in Hong Kong,

habeas corpus. I think his testimony, which my colleagues stress, was wholly insufficient to offset relators' proof of discrimination.[5]

The administrative decision, made in 1952, adverse to relators, rested solely on the blood test evidence. Judge Dimock found (I think correctly) that such blood tests were discriminatorily applied as against Chinese persons; that therefore that evidence was improperly received; and that, except for that evidence, the record entitled relators to admission. Accordingly, they should have been admitted in 1952. It is suggested that this conclusion is artificial and academic, for this reason: Since the time of the adverse administrative decision in 1952, blood tests have been applied without discrimination, so that, if there were now a new administrative hearing, new blood tests could be received properly and would prove that relators are not citizens. I cannot agree with this argument: On the record, as it stood when the adverse administrative decision was made in 1952,

---

thus making a thorough investigation possible, a blood test was still demanded of the parents and the child.

"Exhibit No. 29 involves a naturalized American citizen of Chinese descent who married a Chinese alien woman in Hong Kong who subsequently gave birth to a child there. In a petition to bring his son over, the citizen submitted a contemporaneous birth certificate issued by the British government for his son, and his marriage certificate, also issued by the British government. In addition, the son and wife were living in Hong Kong where an investigation was feasible. But most important there were prior records of the wife and son at the American Consulate and the Consul had been for a long time cognizant of the family relationship of the individuals. Nevertheless, a blood test was required of all the parties.

"Exhibit No. 30 involves an American citizen of Chinese descent who married a Chinese alien in Hong Kong to whom a son was later born, also in Hong Kong. The citizen parent had a contemporaneous birth certificate issued by the British government for his son, and a contemporaneous marriage certificate for his marriage issued by the British government. In addition, the child being born and living in Hong Kong with his mother, the American Consul was able to conduct a thorough investigation. Nevertheless a blood test was required."

[5] See footnote 4.

defendants should have been admitted at that time, and therefore we should deal with the case as if they had been.

At first glance, it might seem absurd that the blood test evidence should be disregarded, inasmuch as it demonstrates that relators are not citizens.[6] But such was the sort of result reached in the justly famous case of *Yick Wo* v. *Hopkins*, 118 U. S. 356. There the relator had been convicted of a violation of an ordinance, and the Supreme Court accepted that violation as a fact. Nevertheless, the Court held that relator must be released on a habeas corpus writ because the ordinance had been discriminatorily applied to Chinese alone. The Court said (118 U. S. at 373-374): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." See also, e.g., *Norris* v. *Alabama*, 294 U. S. 587, 589; *Smith* v. *Texas*, 311 U. S. 128, 130-131; *Patton* v. *Mississippi*, 322 U. S. 463, 465-466.

It might be argued that the doctrine of *Yick Wo* v. *Hopkins* turns on the requirement of "equal protection of the laws" found in the 14th Amendment and that there is no like provision applicable to the federal government. But in *Bolling* v. *Sharpe*, 347 U. S. 497, the Court said, "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are

---

[6] Cf. a case where a decision rests on evidence which indubitably proves a defendant's guilt, but has been obtained by an unlawful search and seizure.

always interchangeable phrases. But, as the Court has recognized, discrimination may be so unjustifiable as to be violative of due process. Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[7]

---

[7] I think it would be improper to direct Judge Dimock now to take evidence as to relators' citizenship in a *de novo* judicial hearing. If relators had been residents of this country, and on their re-entry had asserted their American citizenship, they would have been entitled, on their demand, to such a judicial hearing *de novo*. See *Chin Yaw* v. *U. S.*, 208 U. S. 8; cf. *U. S. ex rel. Madeiros* v. *Watkins*, 166 F. 2d 897, 900 (C. A. 2, dissenting opinion); *Shaughnessy* v. *Mezei*, 345 U. S. 206, 214-215. On the facts of this case, however, the sole function of Judge Dimock was to determine whether the administrative finding of lack of citizenship was supported by the evidence received at the administrative hearing in 1952 and to decide whether the administrative decision adverse to relators was legally justified. *Shaughnessy* v. *Mezei*, 345 U. S. 206, 213-215. Judge Dimock decided that the evidence properly received at the administrative hearing did not support the administrative finding and the administrative decision, and that, as of 1952, relators were entitled to come into this country as citizens.

After Judge Dimock had filed his opinion sustaining the writ, the government moved for a reargument and for a hearing *de novo*, on new evidence, before Judge Dimock. This motion was supported by an affidavit of Inspector Yarbrough. In part the affidavit related to an irrelevant showing of lack of discrimination beginning in 1955. Attached to the affidavit was an Exhibit showing that 40 Chinese persons, out of a total of 124, had been admitted without blood tests between March 1 and September 30, 1952. Relators in a reply affidavit stated: "It will be noted that most of these persons were admitted during the first part of the period involved before blood tests for all Chinese applicants was officially commenced. Moreover, the date of admission no doubt is the date of the final determination of admission and is not the earlier date of the arrival of the applicants at which time they would be examined by the Immigration Service. Dr. George F. Cameron of the United States Public Health Service testified in this case that he did not start blood testing until June 1952. It is obvious that a number of Chinese may have escaped blood testing in March, April and May, or even in June, before the mechanics for blood testing were devised and before the practice became uniformly established as it was at the time that the relators in this case were blood tested in July and August 1952. Dr. Cameron testified that when he

began blood testing in June 1952 he was directed to blood test only Chinese and that he did not blood test any white persons. It is submitted therefore that Exhibit B annexed to Investigator Yarbrough's affidavit is of no assistance and supplies no basis whatsoever for a rehearing. Moreover, the statement that one Chinese recently was not blood tested obviously has no bearing on the uniform practice of blood testing all Chinese which was proved to exist commencing in June 1952."

I think Judge Dimock correctly denied this motion. In addition to the insufficiency of the proposed additional evidence, it would have been improper for the judge to hold a *de novo* hearing. Moreover, the motion was an application for a new trial upon newly discovered evidence, and all the suggested new evidence had previously always been in the government's possession.

LIBRARY
SUPREME COURT U.S.

FILED
AUG 26 1957
T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 32

UNITED STATES OF AMERICA, *ex rel.* LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH,

Petitioners,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

EDWARD J. ENNIS
BENJAMIN GIM
165 Broadway
New York 6, N. Y.
Attorneys for Petitioners

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Question Presented	2
Statement of the Case	2
Summary of Argument	9
Argument	10
I. The evidence conclusively supports the District Court's findings that petitioners were subjected to a blood testing procedure applicable to all Chinese and no white persons	12
II. On the record there is no legal justification for blood testing all Chinese and no white persons	16
A. Issue of Any Factual Justification for Blood Testing Only Chinese Persons Is Not Presented	16
B. The Record Does Not Establish Any Factual Justification for Blood Testing Only Chinese	18
C. Lack of Conscious Race Prejudice Does Not Validate the Discriminatory Practice	20
Conclusion	22

PAGE

Cases:

Avery v. Georgia, 345 U. S. 559 21

Ex parte Lee Dung Moo, 230 Fed. 746 ..... 15n
Ex parte Tom Toy Tin, 230 Fed. 747 ..... 15n

Hernandez v. Texas, 347 U. S. 475 21
Hill v. Texas, 316 U. S. 400, 401 21
Hirabayashi v. United States, 320 U. S. 81 11
Ho Ah Kow v. Noonan, 5 Sawy. 552, 12 Fed. Cas. No. 6546 ..... 15n
Holland v. Edwards, 307 N. Y. 38, 45 21

In re Tiburcio Parrott, 1 Fed. 481 ..... 15n

Jeong Quey How v. White, 258 Fed. 618 14

Lee Wing Hong v. Dulles, 214 F. 2d 753 ..... 15n
Ly Shew v. Dulles, 219 F. 2d 413 ..... 15n

Margong v. Brownell, 109 F. Supp. 821, rv. 209 F. 2d 448 ..... 19n

Norris v. Alabama, 294 U. S. 587 21

Opinion of the Justices, 207 Mass. 601 ..... 15n
Oyama v. California, 332 U. S. 633 20

Patton v. Mississippi, 332 U. S. 463 21

Quan Hing Sun v. White, 254 Fed. 402 14

Takahashi v. Fish and Game Commission, 334 U. S. 410 21

PAGE

Wong Wai v. Williamson, 103 Fed. 1 ..... 15n
Wong Wing v. United States, 163 U. S. 235 ..... 15n

Yick Wo v. Hopkins, 118 U. S. 356 ..... 15n
Yuen Boo Ming v. United States, 103 F. 2d 355 ..... 15n

Constitutional Provision:

Fifth Amendment of the United States Constitution 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 32

UNITED STATES OF AMERICA, *ex rel.* LEE KUM HOY, LEE KUM CHERK, and LLÉ MOON WAH,

Petitioners,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals (R. 413-422) and the dissenting opinion of Circuit Judge Jerome Frank (R. 422-428) are reported in 237 F. 2d 307. The three opinions of the District Court (R.[1] 69a-77a, 55a-63a, 36a-51a) are reported in 133 F. Supp. 850, 123 F. Supp. 674 and 115 F. Supp. 302.

---

[1] The record consists of the "Appendix of the Respondent" in the court below containing the administrative proceedings (R. 1a-401a) and the "Transcript of Record" containing the proceedings in the court below and certain exhibits of petitioners (R. 402-430).

Jurisdiction

The judgment of the Court of Appeals was entered on September 25, 1956 (R. 429-430). The petition for certiorari was filed on November 2, 1956 and certiorari was granted on January 14, 1957 (R. 430). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Constitutional Provision Involved

The Fifth Amendment of the United States Constitution provides in part:

> "No person shall * * * be deprived of life, liberty or property without due process of law; * * * ."

Question Presented

Whether, as limited by the order granting certiorari (R. 430), there was an unconstitutional discrimination against petitioners in the use of blood tests to determine their United States citizenship upon their applications to enter the United States.

Statement of the Case

On June 17, 1952 the petitioners (Lee Kum Hoy, Lee Kum Cherk and Lee Moon Wah), two boys and a girl, being then 22, 13 and 12 years of age, arrived at Ellis Island, New York, and applied for admission to the United States as citizens thereof by virtue of having derived their citizenship from their father, Lee Ha, a United States citizen. They were refused admission and were detained in custody over two years until released on parole in October 1954.

Beginning in July of 1952 the petitioners and their father and mother were examined by officers of the Immigration

and Naturalization Service, sometimes hereinafter called the Service, at a series of hearings with great particularity as to their home in China, their dwelling, family celebrations, identity of nieghbors and relatives. The Board of Special Inquiry found that the testimony of all the petitioners and their parents "has been reasonably harmonious and reasonably consistent with the records of Immigration and Naturalization Service; * * *" (R. 149a-150a).

On two occasions in July and August, 1952, the petitioners, two of whom were minors, being unable to speak the English language and without being advised of their rights, were taken by an immigration investigator to the Public Health Service and were subjected to blood tests (R. 41a, 217a). Their two parents were also directed by the Immigration Service to submit to blood tests (R. 219a). The results of the first blood tests excluded all three petitioners as the possible children of Lee Ha while the second and conflicting blood tests excluded only two of them (R. 136a, 137a, 156a). A series of three administrative hearings reviewed separately by the District Court then followed.

First Hearing and Review—At the first special inquiry hearing beginning on August 14, 1952 and concluding on September 18, 1952 (R. 142a-153a), the Board of Special Inquiry in reliance upon these conflicting blood tests excluded all three petitioners from admission and this decision was affirmed by the Board of Immigration Appeals on May 11, 1953 (R. 154a-160a). The District Court (Dimock, *J.*) in its first opinion of September 17, 1953 then conditionally sustained a writ of habeas corpus in order to reopen the hearings for the purpose of affording petitioners an opportunity to cross examine the technicians who took the disputed blood tests and to develop facts concerning alleged racial discrimination in the administration of such tests (R. 36a-53a, 115 F. Supp. 302).

Second Hearing and Review—Prior to the reopened hearing petitioners' counsel requested the Immigration Service by letter to furnish an official to testify with regard to the number of Chinese and white persons, if any, who were blood tested, and practices and policies of the Immigration Service in the administration of such tests. This request was denied at the reopened hearing on November 30, 1953 by the Special Inquiry Officer who stated that "I feel it has no bearing on this case as to whether it is the policy or is not the policy of the Immigration Service to test all Chinese applicants for admission to the United States" (R. 188a-189a). This position was affirmed by the Board of Immigration Appeals in its second decision of June 17, 1954 (R. 268a).

At the reopened hearing Dr. George F. Cameron, Chief, Department of Pathology, United States Public Health Service, who supervised the blood testing of the petitioners, testified that he first began conducting blood tests on behalf of the Immigration and Naturalization Service pursuant to a circular from the Federal Security Agency entitled "Blood-Type Testing on Request of the Immigration and Naturalization Service," dated May 8, 1952 (R. 210a, 315a); that this circular directed blood testing of United States citizens of Chinese descent and that it did not specify blood testing for persons of other races or nationalities (R. 211a). Pursuant to the directions in this circular Dr. Cameron testified that he blood tested about 200 Chinese persons and no persons of other races in the period from June 1952 to June 1953 (R. 212a). Beginning June 1953, the Immigration Service discontinued using the Public Health Service for blood tests (R. 213a) and began to refer these cases to private experts, such as Dr. Leon Sussman, who testified at the reopened hearing on November 5, 1953, that he had conducted 300 blood tests for the Immigration and Naturalization Service; that all the per-

sons tested were Chinese; and that he had never blood tested a white person for the Service (R. 178a-179a).

The Special Inquiry Officer on December 9, 1953, and the Board of Immigration Appeals on April 12, 1954, again ordered the exclusion of the petitioners (R. 225a-236a, 237a-273a). The respondent then sought dismissal of the writ (R. 56a) relying in part upon the assertion in his return to the writ dated July 22, 1953 that such blood tests "are uniformly now requested of all applicants for admission who are similarly situated, without documentary evidence of any kind" of their identity and relationship to the citizen parent (R. 15a). This position was reaffirmed in the respondent's brief which stated that blood tests were "required as a matter of policy for all persons attempting to enter the United States without birth certificates and similar documents" (R. 332a). In rebuttal petitioners cited two cases of Chinese persons who, although being in possession of birth certificates, were nevertheless subjected to blood tests (R. 26a-27a).

In his second decision of September 1, 1954 Judge Dimock noted that these two cases lent substance to the claim of racial discrimination (R. 61a); that racial discrimination was abhorrent to our institutions and that the Immigration Service and the Board of Immigration Appeals denied petitioners due process of law by holding that the issue of racial discrimination had no bearing on the petitioners' application for admission. He then ordered that the proceedings before the Immigration Service be reopened for the second time for the purpose of developing further evidence on the issue of racial discrimination (R. 62a-63a).

Third Hearing and Review—At the second reopened hearing, beginning October 28, 1954 and ending December 10, 1954, the Immigration Service produced as a witness the attorney who had prepared the return and briefs in

opposition to the writ. He attempted for the first time to minimize the absence of a birth certificate as reason for a blood test, claiming that it was only one of the many criteria for determining whether or not blood test evidence should be required (R. 328, 285a). He claimed that the principal and most important criterion for determining exemption from blood tests was whether the person seeking admission was born in an area where an American Consul was located who could then conduct an investigation and verify from neighbors, friends and local government officials his claim of relationship and identity (R. 328a, 286a). When such investigation was possible, he said, the problem of identity and relationship would rarely arise and there would be no need for a blood test (R. 286a). According to this witness this situation was seldom present in Chinese cases because Chinese children were "invariably born in remote interior villages where no birth records are made" and where the American Consul was unable to conduct an adequate investigation (R. 286a-287a). This witness further testified that the feasibility of a consular investigation was a long standing factor, antedating the blood test program (R. 331a).

Cross-examination of this witness resulted in the admission that the alleged long standing criterion for the imposition or nonimposition of a blood test—namely, the feasibility of a consular investigation, had never been mentioned in his return to the writ (R. 333a-336a) or in the respondent's brief (R. 332a). He conceded that the previous position of the Government, as outlined in its pleadings and brief, was that blood tests would be required in all cases wherein the applicant seeking admission was unable to present a birth certificate and that there was no mention whatever of the feasibility of a consular investigation as being the determining factor for blood tests (R. 332a-344a).

Petitioners, claiming that all Chinese as a racial class were always required to submit to a blood test regardless of whether they had birth certificates or whether they were born in an area where a consular investigation was possible, introduced into evidence, as examples, five cases, Exhibits 27 to 31, (R. 402a-413a). Four of these exhibits were introduced at the special inquiry hearing (R. 355a-356a, 74a-76a) and one before the Board of Immigration Appeals (R. 112a). In each of these cases the applicant was a Chinese child born in the British Territory of Hong Kong, his parents were married in Hong Kong and the child and his mother were living there. The oldest child blood tested in these cases was six years of age and two of the children were less than a year and a half old at the time of the blood tests. In each case the child had never been to China, there was presented a contemporaneous birth certificate issued by the British Government, a British marriage certificate for the parents, and the child was born and lived in an area wherein the American Consul could and did conduct an extensive investigation. Nevertheless, in all these cases the Immigration Service required blood tests.

The respondent's witness also attempted to show the lack of racial discrimination by claiming four "recent" cases involving blood tests of "non-Chinese" (R. 283a-284a). On cross-examination, however, he was unable to state categorically that in these four cases the "non-Chinese" were not colored persons (R. 352a) and further admitted that at least two of them very likely were Negroes (R. 356a-357a). A specific request by counsel to examine these files in order to ascertain the true facts was denied (R. 351a).

The Government's witness was unable to cite a single instance, from the commencement of the blood tests in June of 1952 up to and including his examination on December

10, 1954, wherein a white person was ever blood tested (R. 356a-358a). He was also unable to cite a single case during this two and one-half year period wherein a Chinese person, regardless of the amount of other proof of his claim, was ever excused from the blood tests (R. 377a). Moreover, this witness admitted that the official Operations Instructions of the Immigration Service did at one time contain a specific reference to blood testing Chinese persons and that it had been recently amended to delete this reference (R. 326a-327a). A request to examine these instructions was denied on the ground that they were "confidential" (R. 323a-324a). After this hearing and on January 18, 1955 the Special Inquiry Officer again excluded the petitioners, holding that there was no racial discrimination in blood testing Chinese (R. 382a-391a). The Board of Immigration Appeals affirmed this decision on May 5, 1955 (R. 392a-401a).

On June 7, 1955 the respondent again moved to dismiss the writ (R. 67a-68a) and Judge Dimock, on the basis of the last hearing and on the entire record covering the two earlier administrative hearings, three appeals to the Board of Immigration Appeals, and three review hearings before the District Court, found that the policy of the Immigration Service was to "apply blood tests to all Chinese and to no whites" (R. 71a) and that such racial discrimination was an unconstitutional denial of due process of law. On August 8, 1955 the writ was sustained and the petitioners admitted to the United States as citizens (R. 69a-77a, 133 F. Supp. 850).

On August 15, 1955 the respondent moved for reargument (R. 78a) claiming for the first time that commencing January 10, 1955, sixty white persons had been blood tested and that forty Chinese had been exempted from blood tests in a period prior to June 16, 1952 and prior to blood testing the petitioners (R. 91a-99a). Petitioners

pointed out that the forty Chinese cases were admittedly cases arising prior to the commencement of the blood test program and that the sixty white cases beginning January, 1955, did not excuse retroactively discrimination against the petitioners in 1952 (R. 113a). Judge Dimock denied the motion for reargument without opinion (R. 115a-116a).

The Court of Appeals, Circuit Judge Frank dissenting, reversed Judge Dimock's decision and held that the finding of discrimination was not warranted; that the Immigration Service was actuated by a police motive rather than racial discrimination; and that there was no proof that the Immigration Service was "race-conscious" in the matter (R. 421a).

Summary of Argument

I. The evidence conclusively supports the District Court's findings that petitioners were subjected to a blood testing procedure applied to all Chinese persons seeking to enter the United States as United States citizens and not applied to any white persons in the same situation. The respondent persisted in maintaining in the administrative proceeding and in the courts below that the blood testing procedure was applied to white persons as well as to Chinese but no case was proved in which any Chinese had been excused from blood testing during the period in question or in which any white person had been blood tested. The court below agreed with the District Court that the evidence established that all Chinese were blood tested and that no white persons were blood tested. On this record an unconstitutional racially discriminatory practice was proved and the blood tests of petitioners should be held to be void and the petitioners admitted to the United States as citizens upon the evidence in the case.

II. The court below, after rejecting respondent's contention that blood testing was extended to white persons,

sustained the constitutionality of blood testing Chinese and no white persons on the legal ground that it was not established that the discriminatory practice was "actuated by racial prejudice" rather than a permissible police motive. The petitioners contend that the issue of factual or legal justification for a blood testing practice concededly applicable only to Chinese was not an issue tried in this case and was not relied upon by the respondent who insisted throughout that blood testing was extended to white persons. On the record the defense of justification is not available to the respondent. Moreover, even if the defense of justification of a blood testing procedure applicable only to Chinese is available on the record there is no support either in the facts or in the law for such a justification. The facts do not establish any rational or excusable basis for blood testing only Chinese. As a matter of law a practice racially discriminatory on its face is not excused because the officials administering the practice are not proved to have been "actuated by racial prejudice."

Argument

The respondent originally contended in the administrative proceedings and in both courts below that the blood test practice was in fact not restricted to Chinese but was extended to other persons during the period in question (R. 15a, 60a-61a, 72a). On the facts proved the District Court rejected this contention. The court below in its opinion also did not accept this contention but conceded that there was "no evidence of blood testing in any non-Chinese case or of Chinese admitted without blood testing" (R. 420a). The court below, however, relied upon the view that the disputed practice, even though applied only to all Chinese and no white persons, was lawful if the Service was not "actuated by racial prejudice" and had not "consciously,

in 1952, adopted a discriminatory policy" and was not "race-conscious" (R. 421a). The Solicitor General's brief in opposition to certiorari also does not advance respondent's original contention that the practice was not restricted to Chinese but like the court below contends, in the nature of a plea of confession and avoidance or justification, that blood testing only persons of Chinese origin during the period in question "was not directed against Chinese *because* of their race or color, but *because* of the particular circumstances in China which created special problems" (Br. 12-13, emphasis supplied). Thus both the court below and the Solicitor General appear to have rejected the respondent's original contention that non-Chinese were also blood tested and appear to rely upon some legal justification for the practice. Compare *Hirabayashi* v. *United States*, 320 U. S. 81, in which the military curfew order involved was expressly directed against "all persons of Japanese ancestry" and was justified on the grounds of military necessity.

The petitioners do not know whether the Government in its brief on the merits in this Court will restrict its argument to an attempted justification of the proved practice of blood testing all Chinese and no other persons in the period in question or will also advance respondent's original contention that the practice was not restricted to Chinese. In this situation petitioners' argument may most conveniently be divided to deal with both contentions separately by arguing (I) that in fact the blood testing procedures applied to all Chinese and no white persons, and (II) the reasons asserted in its defense do not supply a constitutional justification.

I.

The evidence conclusively supports the District Court's findings that petitioners were subjected to a blood testing procedure applicable to all Chinese and no white persons.

It is difficult to conceive a state of facts which would more plainly show a practice restricted to one race or ancestry than the record in this case. Despite the obstacles of the Government's claim of confidential privilege for both its Operations Instructions (R. 323a-324a) and also its case records regulating and disclosing the blood test procedure (R. 351a), the petitioners established as a fact that during the two and a half year period between their arrival in the United States on June 17, 1952 and the last administrative hearing before a Special Inquiry Officer on December 10, 1954, five hundred Chinese persons were blood tested on behalf of the Service to determine paternity of applicants for admission to the United States and no white persons were blood tested. The practice was commenced pursuant to a circular from the Federal Security Agency dated May 8, 1952, entitled "Blood-type Testing on Request of the Immigration and Naturalization Service" and expressly directed blood testing of United States citizens of Chinese descent and did not specify blood testing persons of other races or nationalities (R. 210a-211a, 315a). Dr. Cameron of the United States Public Health Service testified that pursuant to this circular about two hundred Chinese persons and no other persons, were blood tested between June 1952 and June 1953 (R. 212a). In June 1953 the Service discontinued using the Public Health Service for blood tests (R. 213a) and used private experts such as Dr. Leon Sussman who testified at a hearing on November

30, 1953 that he had conducted for the Service three hundred blood tests of Chinese persons but no white persons (R. 178a-179a).

Although the Government would not admit the inescapable conclusion from the medical testimony that only Chinese persons were blood tested, the Government's witness up to and including the last administrative hearing on December 10, 1954, was unable to cite a single instance either where a white person was blood tested (R. 357a-358a) or where a Chinese person was not blood tested regardless of the other proof available to support the claim of paternity (R. 377a-378a). The witness admitted that the confidential Operations Instructions of the Service, until their recent amendment, contained specific reference to blood testing Chinese persons (R. 327a). The suggestion in the witness' direct testimony that there were four recent cases of blood tests of "non-Chinese" (R. 283a-284a) upon cross-examination appeared to be two cases of Negroes (R. 356a-357a) and two other cases in which the names were not Chinese but the witness could not state that these individuals were not colored persons and a request to produce the files to determine the facts was denied on the ground the files were privileged (R. 351a-352a).

The facts stated in the affidavit of Dorris E. Yarbrough of August 22, 1955 (R. 91a-99a) in support of the motion for reargument denied by the District Court, if they may be considered at all at this time, further support the conclusion that only Chinese and no white persons were blood tested during the period in question from June 1952 to December 1954. Exhibit "A" annexed to the affidavit lists sixty cases of non-Chinese persons blood tested beginning on January 10, 1955 (R. 96a-98a). Exhibit "B" annexed to the affidavit lists forty Chinese persons allegedly ad-

claimant whose parents had generally recorded his birth at the local American consulate. And even if this were not the case, field investigation of the place of birth or other corroborating evidence was usually available in the non-Chinese case. On the other hand, field investigation in Chinese cases was not feasible (even under normal political conditions) since the rural villages alleged as the place of birth were unknown to American authorities. As a result, the State Department and the Immigration Service were faced with the formidable task of seeking out discrepancies in a Chinese claimant's story, to ascertain the validity of his claim. Such a method was both unreliable and unsatisfactory because of language differences, confusing complexities in Chinese family relationships, and radical cultural distinctions. The net result was that a scrupulously memorized false story might have a better chance to succeed than a true one containing minor discrepancies.

3. The possibilities of fraud inherent in this situation were known to have been previously exploited. In many instances, the putative parent returning to the United States from China would report to the immigration authorities the maximum number of children that could have been born and conceived during his stay in China—thus creating "immigration slots". These "slots" were then sold through brokers to Chinese anxious to enter the United States. The brokers, capitalizing on those seeking to enter the United States, ran training schools and sold family histories (Halgoons) at enormous profit.

4. The use of blood tests was designed to help

distinguish the valid from the fraudulent claim, and the tests have been extremely useful in detecting fraud. Tests conducted in Hong Kong, soon after the practice was adopted, conclusively established that at least 40% of the claimants were asserting fraudulent claims. The tests served to alleviate the uncertainty and harshness of sole reliance upon the "discrepancy test" by eliminating, or serving to corroborate, through recognized scientific methods, doubtful claims of parentage.

5. Blood tests were utilized by the Immigration Service with respect to Chinese claimants in 1952, soon after adoption of the practice by the State Department, and thereafter its use was expanded to all doubtful derivative cases regardless of racial origin. In 1953, the State Department authorized all its consulates throughout the world to utilize blood-testing irrespective of the racial origin of the claimant. The Immigration Service soon followed this policy and in 1955 blood tests were taken, in appropriate cases, of sixty non-Chinese of divergent racial backgrounds. Moreover, even at the time petitioners were tested (1952), blood tests were not taken exclusively in Chinese cases but were used in at least four cases involving non-Chinese.

II

1. The due process clause of the Fifth Amendment is, at least, equally tolerant of reasonable "class legislation" directed at correcting particular evils within Congressional reach, as is the equal protection clause of the Fourteenth Amendment respecting state classi-

fication. *National Labor Relations Board* v. *Jones & Laughlin*, 301 U.S. 1, 46; *United States* v. *Petrillo*, 332 U.S. 1, 8-9. While it is beyond dispute that grossly discriminatory legislation or discriminatory administrative action, especially if predicated on racial grounds, would violate due process (*Bolling v. Sharpe*, 347 U.S. 497, 499), no such discrimination has been shown here. On the contrary, the evidence points to the conclusion that blood testing was adopted by the State Department to meet the difficult problems of establishing identity posed in the numerous Chinese derivative citizenship cases arising in the Hong Kong area which could not be reliably solved exclusively by oral interviews with the claimant. Soon after, the practice of taking blood tests was utilized in this country in order to meet precisely these same problems and because its effectiveness in detecting fraud had already been tested by the time persons situated similarly to petitioners arrived in the United States.

2. Nor is it reasonable to conclude, as did the District Court, that because blood-testing was employed in four isolated Chinese cases despite the existence of birth certificates, or the possibility of field investigation, that the entire blood-testing program was motivated by calculated prejudice. Aside from the fact that, during the same period petitioners were tested (1952), the majority of Chinese claimants were not so tested, these four isolated cases in which blood-testing might have been unnecessary can readily be explained as an exercise of caution. And even if testing in these cases was the result of overzealous

or mistaken caution by local officials, it hardly follows that it represents prejudice at the policy-making level.

III

There is no valid reason for excluding the blood-test evidence in this case even assuming that, when petitioners were tested, the group tested was more limited than it should have been. The evidence is clearly trustworthy, it conclusively demonstrates that petitioners' claims to derivative citizenship are fraudulent, and no valid reason warrants its exclusion.

1. A valid distinction may be drawn between this case and search-and-seizure or coerced-confession cases. When improper government action leads to reversal of a conviction in the latter situation, the result is based on a finding that a personal right has been violated looking solely to the facts of the particular proceeding; here, no personal rights of the petitioners were violated by blood-testing. An analogous case would be one where the validity of a particular search was not in issue but the defendant asserts its invalidity on the sole ground that in another comparable case, no search had been made, allowing another guilty person to go free. But certainly no basis of exclusion can be spelled out on the hypothesis that some other person who was not blood-tested might also have been excluded if given a blood test. We do not allow one defendant to escape proper punishment because another should also have been prosecuted.

2. Moreover, if the rule of exclusion were regarded as a means of disciplining government officials, ir-

respective of petitioners' personal rights, there would still be no occasion to apply such a rule here. For even if, in its inception, testing was erroneously limited to Chinese, this was, at worst, an error arising from the particular circumstances existing in the Chinese cases. And within two years after adoption of these tests by the Immigration Service any limitation in its use was completely abandoned.

ARGUMENT

The sole issue presented in this case, under the limited grant of certiorari, is whether the blood testing of petitioners, in July and August 1952, to determine the validity of their claims to derivative American citizenship, constituted invalid discrimination. Petitioners do not claim that blood-testing is discriminatorily applied at the present time. They allege, however, that, when they were tested, blood testing was limited to Chinese applicants and not applied to white applicants, and argue from that fact that its use was dictated by racial considerations, and hence was unconstitutional.

The government, on the other hand, submits that there was never any administrative policy to limit blood testing to Chinese applicants; that the initial use of the technique in Chinese cases was motivated not by racial considerations, but by the fact that doubtful issues of paternity and identity were most prevalent in those cases; and that there is, in any event, no reason to exclude the evidence in these cases.

Constitutional issues, particularly claims of discrimination and unfairness, cannot be decided in a

vacuum. The allegation of unconstitutional discrimination must be judged in its setting, both immediate and historical. When so considered, the claim of arbitrary action motivated by racial bias is seen to be without foundation. The use of blood testing techniques when issues of paternity and identity were in doubt was first developed by the State Department in Hong Kong in 1951 because of the special problem with which the Department was there faced. Its usefulness led to its adoption by the Immigration and Naturalization Service and to its general application by both departments. There has been no unconstitutional discrimination.

The Use of Blood-Tests In Passing On Petitioners' Claims of Derivative Citizenship Was Not Discriminatory; the Practice Was First Adopted With Respect to Chinese Claimants Because of the Peculiar Problems Such Cases Presented

A. ***The number of claims to derivative citizenship by Chinese applicants in 1951 represented a special immediate problem for consular officers in Hong Kong.***

1. The State Department first started to require blood tests of claimants to derivative citizenship at Hong Kong in the latter part of 1951. At that time, almost all of the American consulates in China had been closed and thousands of Chinese were congregated at Hong Kong seeking travel documents to press their claims to derivative American citizenship (R. 280).[4] Almost all of the Chinese applications for

[4] Background material, pertinent to the issues posed in this case, is contained in Foreign Service Despatch, Report

American citizenship were based on oral claims and almost all the applicants came from an area in the interior of China (Kwang Tung Province) where, at best, only the most superficial investigation of their claims might have been possible, and even this was precluded by political events requiring the closing of American consulates throughout China. From January 1, 1950 to May 1, 1953, 7,500 travel affidavits were issued by the Hong Kong consulate.[5]

2. Aside from the political climate in 1951, and the other factors we have mentioned, the claims to derivative citizenship by Chinese had a historical background which differentiated them from claims by Europeans. Chinese had come to this country in large numbers after gold was discovered in California in 1848, but had been almost totally excluded from 1882 to 1943. Thus at the time of the greatest immigra-

---

on the Problem of Fraud at Hong Kong, issued December 9, 1955, by the American Consul General at Hong Kong (hereinafter referred to as "Report"), ten copies of which are being filed herewith. Additional statistical material and affidavits prepared by the Immigration and Naturalization Service and the Passport Office of the State Department, prepared for this case, appear in the Record at pp. 91-101. These affidavits and statistical material were submitted to the District Court in support of the government's motion for reargument. This motion was denied by Judge Dimock, and the supporting evidence rejected without comment. The materiality of this evidence on the question of discrimination was recognized by the court below although it did not have to reach the question of the propriety of its exclusion since, on the admitted evidence, it found no unconstitutional discrimination (237 F. 2d at 311, fn. 3).

[5] Schatkin, Sussman and Yarbrough, *Chinese Immigration and Blood Tests*, 2 Cr. L. Rev. (Spring 1955) 44,46.

tion from Europe, during the latter part of the 19th and early 20th century,[6] the vast majority of Chinese could not enter the United States, and those few deemed admissible under the Act of 1882, 22 Stat. 58, 60 (*e.g.*, treaty merchants) could not become citizens. A cultural pattern developed whereby Chinese men who were already citizens of the United States would return to China, marry and have children there, and return to the United States, leaving wife and children behind. When the children, particularly the male children, became older, they would apply for admission as children of an American father. Thus claims of derivative citizenship by Chinese had, for a long time, had special significance as a means of entry in the United States. This was not changed by the lifting of quotas since that did not occur until 1943 when quotas generally were severely limited, the annual Chinese quota being fixed at 105 (57 Stat. 600, 601; 58 Stat. 1125).[7]

3. The number of applicants claiming derivative citizenship increased markedly after the adoption of Section 503 of the Nationality Act of 1940, 54 Stat. 1171, which authorized declaratory judgment suits to determine claims of nationality, irrespective of

---

[6] Between 1901-1911, nearly nine million immigrants came to the United States. Tyler, *Immigration and the United States* (1956) 29.

[7] The significance of non-quota entry into the United States is demonstrated by the fact that, despite the limited quota of 105 entrants annually, the number of persons of Chinese extraction in the United States increased by 50% between the 1940 and 1950 census. Report, p. 2.

whether the claimant resided in the United States,[8] so that claimants were entitled to a judicial proceeding *de novo* on the issue of citizenship. *Mah Ying Qg* v. *McGrath*, 187 F. 2d 199, 201-202 (C.A. D.C.); *Chow Sing* v. *Brownell*, 217 F. 2d 140 (C.A. 9); *Brownell* v. *Lee Mon Hong*, 217 F. 2d 143 (C.A. 9).[9] Since this was a judicial proceeding, once a prima facie showing had been made, usually by the uncorroborated testimony of the claimant and his alleged parents, proof of non-citizenship had to conform to common law rules of evidence.

It was for the purpose of prosecuting declaratory judgment suits that travel documents were sought by Chinese overseas where passports were denied.

---

[8] 8 U.S.C. (1946 ed.) 903 provided in pertinent part:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. * * *"

Under the Immigration and Nationality Act of 1952, proceedings for declarations of nationality are available only to persons residing in the United States when the suits are commenced (8 U.S.C. 1503(a); 66 Stat. 273).

[9] Before 1940, as to persons who did not reside in the United States, the determination of non-citizenship by administrative authorities was not open to collateral attack. *United States* v. *Ju Toy*, 198 U.S. 253; *United States ex rel. Medeiros* v. *Watkins*, 166 F. 2d 897, 899 (C.A. 2), and cases there cited.

Until some time in 1951, travel documents were issued by the State Department on very slight evidence of identity, the assumption being that only bona fide claimants would ultimately be admitted. Largely because of the difficulties in differentiating valid claims from fraudulent ones in the absence of new investigatory techniques (see *infra*, pp. 24-28), only 2% of the almost 6,000 applicants to whom such documents had been issued were refused entry by immigration authorities.[10] And those refused entry could still bring actions under Section 503.

From August, 1947, when the first Chinese case under 8 U.S.C. 903 was commenced in the federal courts (*Mah Ying Og* v. *McGrath*, 187 F. 2d 199 (C.A. D.C.)), until the end of 1952, 1288 such cases were instituted under that section for a declaration of derivative American citizenship. Of these cases, 716 arose in the Northern District of California, 189 in the Southern District, 61 in the Western District of Washington, and 9 in the District of Oregon. *Ly Shew v. Acheson*, 110 F. Supp. 50, 54-55 (data collected) (N.D. Cal.) vacated and remanded *sub nom. Ly Shew* v. *Dulles*, 219 F. 2d 413 (C.A. 9);[11] *Dong Wing Ott* v. *Shaughnessy*, 116 F. Supp. 745, 751-752 (S.D. N.Y.), affirmed, 220 F. 2d 537 (C.A. 2), certiorari denied, 350 U.S. 847.

---

[10] Schatkin, Sussman and Yarbrough, *op cit.*, 2 Cr. Law Rev. at 47.; cf. Report pp. 18-19.

[11] The Ninth Circuit vacated and remanded the case because the district judge applied a too severe burden of proof upon the applicants. The district court again found against the applicants (131 F. Supp. 113). The Ninth Cir-

B. *The usual techniques of checking claims to derivative citizenship were inadequate for this type of claim.*

1. The pattern of behavior which gave rise to these derivative citizenship claims by persons of Chinese descent allowed great opportunities for fraud. It is described in *Mar Gong* v. *McGranery* 109 F. Supp. 821 (S.D. Cal.) (reversed, *sub nom. Mar Gong* v. *Brownell*, 209 F. 2d 448 (C.A. 9)[12]), as follows:

The alleged father of the applicant, either a native born or derivative American citizen, returns, when a young man, to his ancestral village in China to contract a marriage. This marriage, to a native Chinese, is arranged and performed in accordance with established Chinese custom and ceremony. Within a year or so after marriage, a child is born to the couple. The American father generally remains in China until his wife again conceives, and returns to the

---

cuit reversed again, finding that the claimants had established their claim to derivative citizenship. *Ly Shew* v. *Dulles*, No. 14,768, June 23, 1956. On November 16, 1956, however, the Court of Appeals vacated its order and opinion and dismissed the appeal pursuant to the request of applicants' attorney who advised the court that he had recently learned that the claims were fraudulent (No. 14,768, filed November 16, 1956.)

[12] The 9th Circuit reversed and remanded on the ground that an improper burden of proof was employed. Moreover, it was held error for the district court to consider the similarity in factual pattern among all Chinese cases on the issue of whether the petitioners in *Mar Gong* were asserting a fraudulent claim. But, as noted by the court below, that "opinion did *not* suggest that knowledge of frauds attempted in cases of a similar pattern might not be considered for its bearing on the scope of investigation appropriate in the particular case. Indeed blood testing was involved in the Mar Gong case" (237 F. 2d 307, 310 n. 1).

United States when his children are quite young or not yet born. Upon his return to the States, he notifies the immigration authorities of all pertinent data relating to the births of his children in China (names, dates of birth, etc.). Subsequently, he may return to China on numerous occasions, and each time the above pattern is repeated. The children grow up in China and when in their teens or older apply for entry to the United States as the sons of a Chinese-American father and Chinese mother. The father has either never seen the children or has seen them only when they were quite young. The claimants submit no birth records. They usually come from rural villages in the interior of China which have no hospitals, or birth registration requirements. In fact, 95 per cent of the 716 applicants in the Northern District of California allegedly come from Kwang Tung Province, from villages unknown to American authorities and not designated on any available maps (*Lay Shew v. Acheson, supra*, 110 F. Supp. at 56). Very rarely is there any corroborating documentary evidence of filial relationship (Report, pp. 51-52). Letters between the alleged parent and the child generally refer to the years immediately preceding the application. The claims are almost always based entirely on self-serving oral assertions.[13] See Schatkin, Sussman and Yarbrough, *Chinese Immigration and Blood Tests*, 2 Cr. L. Rev. (Spring 1955) 44.

[13] Petitioners' putative father came to the United States as a derivative citizen in 1926, returned to China in 1929, and again in 1938. The petitioners were allegedly begotten during his visits in China (R. 39). Their claim to citizenship was unsupported by documentary evidence.

LIBRARY
SUPREME COURT, U.S.
RECEIVED
NOV 13 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 32

UNITED STATES OF AMERICA, *ex rel.* LEE KUM HOY, LEE KUM CHERK, and LEE MOON WAH,

Petitioners,

—v.—

JOHN L. MURFF, District Director of the Immigration and Naturalization Service,

Respondent.

PETITIONERS' MOTION TO STRIKE IMMATERIAL AND SCANDALOUS MATTER

Petitioners, by their attorneys, respectfully move this Court to strike from the record, pursuant to Rule 40(5) and its inherent powers, the Foreign Service Despatch of December 9, 1955 and the attached undated and unsigned and anonymous "Report on the Problem of Fraud at Hong Kong" sent from the American Consul General at Hong Kong referred to in the prior despatch of December 1, 1955. This Report was filed by the Respondent with this Court without leave of Court or motion to enlarge the record. Petitioners also move the Court to strike from the Respondent's Brief the numerous references to the said Report (Br. pp. 19-20, 25, 27, 30, 32) and for the following reasons:

1. This undated Report and any investigative material on which it was based were never submitted in evidence in any of the extensive administrative hearings in the Immigration and Naturalization Service or in any of the proceedings in the courts below, and is, therefore, not a part of the record before this Court.

2. The submission at this time of this Report containing highly controversial allegations of fraud among Chinese persons, is prejudicial, improper and unfair and deprives Petitioners of the opportunity to cross-examine the unknown author of such Report and to attack the conclusions therein.

3. The Report contains impertinent, inflammatory and unproved charges against the entire Chinese race, which were not made under oath and are not entitled to the consideration of this Court and are irrelevant, immaterial and scandalous.

WHEREFORE, Petitioners respectfully pray that an order be granted striking the said Report from the Record and striking all references to said Report from Respondent's Brief.

Dated: November 15, 1957

EDWARD J. ENNIS
Counsel for Petitioner Lee Moon Wah

BENJAMIN GIM
Counsel for Petitioners Lee Kum Hoy and Lee Kum Cherk

In the

Supreme Court of the United States

October Term, 1957

No. 32

United States of America, *ex rel.* Lee Kum Hoy, Lee Kum Cherk, and Lee Moon Wah,

Petitioners,

—v.—

John L. Murff, District Director of the Immigration and Naturalization Service,

Respondent.

PETITIONERS' REPLY BRIEF

Petitioners reply briefly to respondent's arguments that (I) in fact blood testing was not restricted discriminatorily to Chinese; (II) blood testing only Chinese was justified and not in law discriminatory; and (III) the blood test evidence was admissible even though obtained pursuant to an unlawful discriminatory practice.

I.

In fact racial discrimination against Chinese was practiced.

The greater part of respondent's argument (Br. 18-33) is devoted to the factual argument that blood testing citizenship claimants was "first adopted" (Br. 19) with respect to Chinese because of the prevalence of fraudulent claims among them and then "was utilized generally" (Br. 33)

after it was found helpful in Chinese cases. This argument, however, fails wholly to meet the undisputed facts that when petitioners were blood tested twice in July and August, 1952, and for a two and a half year period thereafter until the last administrative hearing on December 10, 1954, the indisputable evidence, accepted by the court below, was that 500 Chinese had been blood tested and there was no evidence of blood testing any non-Chinese (R. 420a). Even if the affidavits submitted in support of the motion for reargument in the District Court after the final decision in the case could be considered[1] they merely show blood testing of non-Chinese beginning on January 10, 1955 (Ex. A, R. 96a-98a). This belated blood testing of some non-Chinese cannot retroactively absolve from judicial condemnation of discrimination the practice of blood testing all Chinese, including petitioners, and no one but Chinese for over two and a half years.

The respondent concludes his argument on this point (Br. 32-33) with the statements, which petitioners challenge, that when petitioners were blood tested in July and August, 1952, there were no Service instructions relating

---

[1] These affidavits in support of the denied motion for reargument, containing statements that non-Chinese had been blood tested, are not evidence properly in the record and should not be considered by the Court. *Grame* v. *Mutual Assurance Society of Virginia*, 154 U. S. 676; *Susquehanna Boom Co.* v. *W. Branch Boom Co.*, 110 U. S. 57, 59. For all that appears from one of the affidavits which states (R. 101a) that some non-Chinese were blood tested in determining citizenship and paternity and that a number of citizens of the Chinese race received passports without blood testing, it may be that the citizens of the Chinese race granted passports were all persons living in the United States who had had passports before and were merely going abroad for visits and that all of the derivative United States citizens of the Chinese race seeking passports abroad to come to the United States for the first time were blood tested (R. 105a). These general statements were not subjected to that cross-examination which elicited important admissions from the Government's witness at the administrative hearing.

to blood testing; that instructions thereafter issued referring specifically to Chinese did not limit blood testing to Chinese; and that during 1952 to 1954 at least four non-Chinese were blood tested. The first statement that there were no Service instructions on blood testing in July and August, 1952, is based on the self-serving statement of the Service's witness that it was not until late 1952 or early 1953 "that any instructions at all were made by the Service with respect to blood tests" (R. 326a). This witness, however, on cross-examination qualified this quoted statement and indicated that there may have been original but not "final authorization" for blood testing prior to the end of 1953 (R. 312a). He testified that "There may have been some instructions concerning the use of blood tests in other types of procedures but none in Exclusion proceedings" (R. 313a). Moreover, the Service refused to produce the Operations Instructions in effect in July and August, 1952 (R. 316a). On this record the respondent's claim that there were no instructions on blood testing Chinese at the time petitioners were in fact blood tested cannot be accepted.

The respondent's second statement that later instructions referring specifically to Chinese did not limit blood tests to Chinese similarly cannot be accepted. The Service refused to allow petitioners' counsel to examine these instructions and even refused to summarize them or reveal any of their specific language (R. 321a-324a). Although possibly these instructions did not specifically prohibit blood testing of white persons it is reasonably clear that by specifically directing blood testing of Chinese and no others they established a racially discriminatory system of blood testing Chinese and not white persons. This view is supported by the Service's admission that these instructions were changed in 1954 to eliminate reference to the Chinese racial or nationality group (R. 327a, Br. 9-10).

The last statement (Br. 33) that at least four non-Chinese persons were blood tested in the period 1952-1954 is subject to the qualifications that on cross-examination the witness conceded that two of the cases involved British subjects from the British West Indies who quite possibly were Negroes (R. 357a); that a request to examine the files to determine the facts was refused (R. 351a); and that the subsequent affidavit of August 22, 1955, listing blood tests of white persons, apparently does not include these cases but begins with blood tests on and after January 10, 1955 (R. 96a).

It is submitted that the respondent has failed wholly to support his argument that "there was never any administrative policy to limit blood testing to Chinese applicants" (Br. 18) because the record establishes that in fact for a period of over two and a half years there was such a policy and practice of blood testing all Chinese and no white persons.

II.

There is no factual or legal justification for the racially discriminatory practice.

The respondent argues (Br. 34-41) that blood testing only Chinese was not grossly and racially discriminatory because Chinese citizenship cases presented an evil not equally present in other cases. The petitioners adhere to but do not repeat their argument (Br. 16-18), not answered in respondent's brief, that this defense of alleged factual justification is not available to respondent for the first time in this Court. This defense was suggested for the first time in the opinion of the court below. Throughout the three administrative hearings and the review thereof by the Dis-

trict Court the Service maintained that blood testing was not restricted to Chinese. The record is devoted and restricted to that factual issue and the Service did not tender or try the issue of the existence of a factual situation justifying blood testing of Chinese alone. If that claim had been made and if that issue had been tried the petitioners would have had an opportunity to meet any evidence offered in support of such a factual justification.

The unfairness of allowing the respondent to introduce this new factual issue into the case at this time is emphasized by consideration of the nature of the factual support upon which the respondent now attempts to rely on this issue and in particular the Hong Kong Report and the two law review articles co-authored by Immigration Inspector Yarbrough during the pendency of this case in which he submitted an affidavit in support of the motion for reargument (R. 91a-99a). The attempted reliance upon the Hong Kong Report, which petitioners have moved to strike as improperly submitted to the Court, violates the rule of this Court against reference to and attempted reliance upon factual matters *dehors* the record. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54; *Schley* v. *Pullman Car Co.*, 120 U. S. 575, 578. Similarly, the attempted reliance upon the alleged factual material, as distinguished from the legal discussion, in the two law review articles and in the judicial opinions in other cases to which the petitioners were not parties, is not permissible.

The undated anonymous Hong Kong Report is replete with unsupported dubious generalities which disclose the racial bias and antagonism of the author or authors. The respondent's reliance on such a report actually supplies further evidence of a regrettable disposition to indulge in

the racially discriminatory practice which was proved in this case.[2]

If the respondent had conceded the racial discrimination which was practiced and had sought to justify it at the administrative hearings because of alleged fraud in Chinese cases the petitioners would have had the opportunity not only to refute the hearsay generalities now offered concerning Chinese but also to show the Service's own experience with fraudulent claims of identity and citizenship in non-Chinese cases. For example in 1954 some 70 Cubans were deported for fraudulent citizenship claims supported by forged birth certificates (Annual Report of the Service for 1954, p. 45. See also 1952 Report, p. 57 for similar cases of false passports procured by Filipinos in Honolulu and p. 16 of the 1955 Report in respect of false birth certificates procured by persons from Mexico).[3]

---

[2] For example, the Report appears to accuse Chinese generally of "resisting Americanization" (p. 3a); views with alarm the meager Chinese immigration into the United States (pp. 25-26); alleges hostility of the Chinese to government generally and their lack of morals in dealing with the State and their approval of bribery (p. 58); questions the loyalty of American citizens of Chinese ancestry born abroad on the basis of their lack of knowledge of the English language and of American geography (p. 81); and concludes with some vague generalities about guilt feeling of many Americans in respect of Chinese coupled with the traditional American attachment to the under-dog as assisting illegal entry into the United States (p. 88).

[3] The suggestion that American citizens of the Chinese race beget more children abroad who seek to enter the United States and therefore present a greater problem of potential fraud seems to be belied by the statistics which disclose 98 derivative citizenship certificates issued for persons from China in 1954 and 153 in 1953 compared with 1914 in 1954 and 2303 in 1955 for persons from Italy, and 1123 in 1954 and 1556 in 1955 for persons from Germany (Annual Report of the Service for 1955, p. 138). Similarly, statistics concerning the entry of non-quota immigrant alien children born abroad to United States citizens disclose, for example, for the fiscal year 1954, 2736 such children from Italy but only 336 from China (Annual Report of the Service for 1954, Table 6).

Many cases of false citizenship involving non-Chinese appear in the published reports of the Board of Immigration Appeals (VI I. & N. 259, 275; IV I. & N. 415, 748; III I. & N. 69, 76; II I. & N. 581). See also the judicial decisions involving false claims of citizenship by non-Chinese. *Cunard SS. Co.* v. *Eltinge*, 97 F. 2d 373 (C. A. 2); *Navigazione Generale Italiano* v. *Eltinge*, 76 F. 2d 885 (C. A. 2); *New York & Puerto Rico SS. Co.* v. *U. S.*, 66 F. 2d 523 (C. A. 2); *Compagnie Generale* v. *U. S.*, 78 F. Supp. 797 (Ct. Cl.); *New York & Puerto Rico SS. Co.* v. *U. S.*, 58 F. 2d 827 (S. D. N. Y.); *McFarland* v. *U. S.*, 19 F. 2d 807 (C. A. 6); *United States* v. *Mouyas*, 42 F. 2d 743 (S. D. N. Y.). Congress recently has recognized the prevalance of thousands of fraudulent claims by persons seeking to enter the United States regardless of nationality or citizenship by providing in §7 of the Act of September 11, 1957, 71 Stat. 639 (P. L. 85-316) that certain aliens who have procured visas or other documentation or entry into the United States by fraud or misrepresentation shall not be deported, and if seeking entry and excludable on such a ground may nevertheless be granted visas and admitted if the Attorney General in his discretion consents to the application for a visa. See H. R. No. 446, 85th Cong., 1st Sess.

The respondent states incorrectly (Br. 29) that Judge Dimock concluded that the program was racially discriminatory "because four Chinese from Hong Kong were blood tested" (Br. 29). Judge Dimock expressly stated that these four cases were cited merely "as examples" (R. 74a).[4] These were not "four isolated cases" as respondent erroneously argues (Br. 39) but merely a few examples which petitioners' counsel were able to obtain from members of the Bar out of many more cases known to the Service but

[4] A fifth similar example was also cited by petitioners (R. 411a-413a).

not made available to petitioners. The fact that these cases were not isolated examples seems to be conclusively established by the "evidence" which the respondent did belatedly seek to offer on the motion for reargument in the form of Exhibit B annexed to the Yarbrough affidavit of August 22, 1955 which refers to Chinese admitted without blood testing and includes no case of a Chinese admitted after June 16, 1952 (R. 98a-99a). This indicates rather clearly that all Chinese admitted thereafter, whether from Hong Kong or elsewhere, from July 1952 to December 1954, the period of the discriminatory racial practice, were blood tested because if they were not it is to be assumed that the Service would have included such cases in Exhibit B. Even the Service's claim does not indicate, as respondent implies, that forty Chinese were admitted without blood testing in cases arising "from March 1, 1952, through September 30, 1952" (Br. 39-40) but on the contrary discloses that all of these forty Chinese were admitted without blood testing prior to June 16, 1952 and apparently prior to commencement of the discriminatory practice.

Respondent's statement (Br. 40) that from August 1952 to August 1955 the Passport Office issued 5,150 passports to derivative citizens of the Chinese race without blood tests and 850 passports to such citizens with blood tests is substantially meaningless because from all that appears from the affidavit containing this information the 850 may include all Chinese applying abroad for their first passports to come to the United States and the 5,150 may be merely persons in the United States seeking a renewal of passports to visit abroad. These inapplicable and misleading statistics cannot be allowed to obscure the fact that the Service has been unable to produce one case of a Chinese derivative citizen abroad seeking to come to the United States for the first time during the period in question who was not blood tested. In the absence of such evidence, and in view of the

refusal upon the claim of privilege to produce the records which would disclose the actual facts, it is confusing if not actually misleading for the respondent to argue that the petitioners' examples of the practice of blood testing all Chinese are merely "isolated cases" or "mistaken action by local officials in a few cases" (Br. 40). These examples are evidence of a uniform racially discriminatory practice in opposition to which respondent, although repeatedly challenged to do so, has not been able to produce even one case of such a Chinese not blood tested during the period in question.

Respondent concludes his argument on this point with the extraordinary statement that if Congress did not unconstitutionally discriminate against radio workers or non-agricultural employees by legislation applicable to them and not to others on a non-racial basis, then the Service did not unlawfully discriminate against Chinese by blood testing them on a racial basis. Petitioners hesitate to argue the obvious constitutional distinction between what Congress may do by legislation on a non-racial basis and what a federal administrator may do without legislative authority on a racial basis. It is sufficient to point out that this Court has repeatedly stated that only the most compelling reasons, certainly not present here, can save from judicial condemnation any governmental discriminatory practice based on racial discrimination which violates our basic social tenets. *Bolling* v. *Sharpe*, 347 U. S. 497; *Oyama* v. *California*, 332 U. S. 640, 646; *U. S.* v. *Carolene Products*, 304 U. S. 144, 153.[5]

---

[5] In *Hee Fuk Yuen* v. *White*, cited by respondent (Br. 38), the Chinese alien merchants merely sought protection of the favored nation clause of the treaty between China and the United States and not the protection of the due process clause of the Fifth Amendment. Compare *Wong Wai* v. *Williamson*, 103 Fed. 1 (C. C. N. D. Cal.) involving an unconstitutional racial application of a bubonic plague ordinance.

III.

The unconstitutionally acquired blood test evidence was not admissible.

The respondent finally argues (Br. 41-43) that the disputed blood test evidence should be admitted because of the claimed reform of the procedure. This claim is based on the assertion in an affidavit on the motion for reargument of the trial court's decision of August 8, 1955, that commencing *post litem motam* in January 1955, some white persons were blood tested (R. 96a-98a). In view of the Service's insistence throughout the case that there has never been any racial discrimination and its persistent refusal to make available the facts contained in its Operations Instructions, the final disclosure that some white persons were blood tested after January 10, 1955 cannot be taken as establishing that the racial discrimination of blood testing all Chinese but not all whites was discontinued. Blood testing some whites does not excuse blood testing all Chinese. Significantly the claim that some Chinese were not blood tested before June 16, 1952 (R. 98a-99a) indicates that all Chinese were blood tested thereafter, including the period after January 1955, and there is no evidence to the contrary.

But even if we accept *arguendo* the claim that racial discrimination in blood testing has ceased, the short answer to respondent's contention that the petitioners should have no judicial protection from the racially discriminatory blood testing procedure is that the evidence should be excluded because "exclusion is the only practical way of enforcing the constitutional privilege." *U. S.* v. *Pugliese*, 153 F. 2d 497, 499 (C. A. 2, L. Hand, *J.*). Moreover, respondent is not correct in asserting that exclusion of the petitioners' blood tests would constitute a novel and ex-

tended application of the exclusionary rule beyond its "development in other fields, including criminal cases" (Br. 41). In *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 153, 155, this Court stated (Brandeis, J.): "It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings." This is but one expression of this Court's repeated recognition that evidence unconstitutionally obtained must be excluded. *Rea* v. *United States*, 350 U. S. 214; *Rochin* v. *California*, 342 U. S. 171.

Finally, respondent concludes that exclusion of the blood tests would confer on petitioners citizenship they do not possess (Br. 43). But the Board of Special Inquiry found that the testimony of petitioners and their parents was harmonious and consistent with the Service's records (R. 149a-150a) and the petitioners' exclusion as aliens was based entirely on the disputed and conflicting blood tests (R. 155a). Judge Dimock in his first opinion recognized that the accuracy of the blood tests "was clouded in doubt and uncertainty by the inconsistency between the two tests if by nothing else" (R. 47a). In his second opinion he stated that the evidence, including the blood tests, satisfied due process (R. 56a). In his third opinion he stated that petitioners' showing of paternity was sufficient but for the requirement of blood tests (R. 76a), but in view of his decision that the blood tests should be excluded he did not discuss validity or reliability of blood tests. A ground of petitioners' cross-appeal, that reliance on the conflicting blood tests denied due process of law (R. 120a), was not discussed by the court below in its opinion (R. 414a-422a) and the request for certiorari on this ground (Pet. 2, 13-15) was not granted (R. 430a). The respondent's assumption, however, that the blood tests reliably disclosed lack of paternity of any of the petitioners is not warranted

because both medical experts in this case repudiated the blood tests made in this case (Pet. 14, R. 178a, 215a-216a).

The petitioners should be ordered finally admitted as citizens on the basis of the evidence, other than the illegal blood tests, concededly sufficient to establish their paternity and of the character upon which thousands of other applicants have been admitted as citizens. The alleged reform of blood test procedure is no reason to subject these petitioners to further administrative proceedings not lawfully in use at the time they sought admission in 1952.

Respectfully submitted,

EDWARD J. ENNIS
165 Broadway
New York 6, N. Y.
Attorney for Petitioner
Lee Moon Wah

BENJAMIN GIM
24 Pell Street
New York 13, N. Y.
Attorney for Petitioners
Lee Kum Hoy and
Lee Kum Cherk

LIBRARY
SUPREME COURT, U.S.

No. 545

Office - Supreme Court, U.S.
FILED
DEC 13 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, EX REL. LEE KUM HOY, LEE KUM CHERK, AND LEE MOON WAH, *Petitioners*

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	12
Conclusion	16

CITATIONS

CASES:

Beach v. *Beach*, 114 F. 2d 479	14, 15
Berkman v. *Tillinghast*, 58 F. 2d 621	14
Chew Deck, United States ex rel. v. *Commissioner*, 17 F. Supp. 78, affirmed, 86 F. 2d 1020, certiorari denied, 300 U.S. 666	15
Dong Wing Ott v. *Shaughnessy*, 220 F. 2d 537, certiorari denied, 350 U.S. 847	13, 14
Eagles v. *United States*, 329 U.S. 304	15
F.C.C. v. *Pottsville Broadcasting Co.*, 309 U.S. 134	15
Gung You v. *Nagle*, 34 F. 2d 848	14
Jung Yen Loy v. *Cahill*, 81 F. 2d 809	14
Kwong Han Foo v. *Ward*, 126 F. 2d 615	14, 15
Lee Fan, In the Matter of (0300/423162, February 25, 1953)	14
Lee Wing You, Mason ex rel. v. *Tillinghast*, 27 F. 2d 580	14
Lue Chow Kon v. *Brownell*, 220 F. 2d 187	13, 14, 15
National Labor Relations Board v. *Jones & Laughlin Corp.*, 301 U.S. 1	12
Sunal v. *Large*, 332 U.S. 174	15
Wong Fuey Ying v. *Dulles*, 137 F. Supp. 470	15

MISCELLANEOUS:

Rule 35, F.R.C.P.	14
Civil Practice Act of New York	14

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 545

UNITED STATES OF AMERICA, EX REL. LEE KUM HOY, LEE KUM CHERK, AND LEE MOON WAH, *Petitioners*

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. 1a-16a) are not yet reported. The opinions of the District Court (R. 70, 55, 36) are reported at 133 F. Supp. 850, 123 F. Supp. 674, and 115 F. Supp. 302, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1956. The petition for a writ of certiorari was filed on November 2, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were unreasonably discriminated against when, during an investigation of their applications for entry into this country under claim of derivative citizenship through a citizen father, they were given blood tests.

2. Whether the court below correctly held that the lack of specific statute or regulation did not preclude administrative investigators of the Immigration and Naturalization Service from requesting that such blood tests be given petitioners, where, although they had the burden of establishing their claim to citizenship, they were unable to produce any competent documentary evidence in support of their claim.

3. Whether, on collateral attack by habeas corpus, the weight of the evidence obtained from blood tests can be considered.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals reversing the order of the District Court which had granted a writ of habeas corpus and admitted petitioners to the United States as citizens (R. 115-116).

The evidence and the proceedings in this case may be summarized as follows:

On June 17, 1952, the petitioners, two boys and a girl aged 21, 13, and 12 respectively, arrived in New York from Hong Kong (R. 131, 148, 149). The three claimed to be the children of Lee Ha (an American citizen) and his wife Wong Tew Hee* (an alien), to whom the alleged father was married in China in 1923 (R. 149).

The case was referred to a Board of Special Inquiry and a hearing was commenced on August 14, 1952 (R. 123). Petitioners, who were represented by counsel, were informed that the burden was upon them to establish that they were admissible (R. 124). They testified that they were born in Toishan District of China (R. 125), and that they had never before been in the United States (R. 131). Lee Ha, the claimed citizen father, and Wong Tew Hee,* the alleged mother, testified in support of their claimed relationship to the children and to each other (R. 134, 136). The petitioners and the alleged parents were questioned in detail as to their alleged common home in Lung Woy Village, Toishan District, China (R. 126-130, 134-135, 137).

The immigration inspector introduced into evidence the results of two blood tests taken of the three petitioners and the alleged parents by the United States Public Health Service on two occasions prior to the hearing (R. 131-133, 135, 136). The tests showed that

---

* Also variously referred to in the proceedings as Tew Hee Wong and Hee Tew Wong.

each of the claimed parents was in blood group "A", while Lee Moon Wah, and Lee Kum Hoy were in blood group "B", and Lee Kum Cherk was in blood group "O" (R. 150). The Service inspector also introduced into evidence an article in the United States Law Review entitled "Blood Grouping Tests in the New York Courts" by Alexander S. Wiener, M.D. (R. 137) from which it appeared that, on the basis of the blood test results, the petitioners Lee Moon Wah and Lee Kum Hoy could not be related to the claimed parents (R. 137, 150). Petitioners' counsel objected to the introduction into evidence of both the blood test results and the article by Dr. Wiener (R. 133, 140). A request that Dr. Wiener be produced for cross-examination was denied (R. 140).

Petitioners were, however, granted a continuance until September 18, 1952, in order that they might have independent blood tests made to meet the evidence adduced by the Service (R. 140-141). On that date petitioners' counsel withdrew his request for independent blood tests and reiterated his request to cross-examine Dr. Wiener which request was again denied (R. 143-144).

The Board then rendered its exclusion order, finding *inter alia* that while the oral testimony of the witnesses as to their claimed common home in China was "reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service", the blood tests excluded the possibility that Lee Moon Wah and Lee Kum Hoy were the children of the claimed parents. It further ruled that, while the claimed parentage was possible in the case

of Lee Kum Cherk,[1] his credibility was impeached by the results of the blood tests, since if the other two children were not the children of the alleged parents, he could not be both their brother and the son of the alleged parents (R. 149-151).

On May 11, 1953, the Board of Immigration Appeals, concurring in the findings of the Board of Special Inquiry, dismissed petitioners' appeal (R. 154-160).

On July 13, 1953, Lee Ha the alleged father filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York alleging *inter alia* that although the present petitioners were citizens, they were about to be deported to Communist China; and that they had not had a fair hearing in the exclusion proceedings by virtue of the fact that they had not been allowed to examine the qualifications of the unidentified individuals who conducted the blood tests, or the author of the article on blood tests introduced into evidence (R. 5-9). In an amendment to this petition (R. 9-10) it was also alleged that the blood tests given petitioners were taken without the authority of any statute, rule, or regulation by the Immigration and Naturalization Service, and that such tests were required only of Chinese persons seeking admission and their parents and not of persons of other races (R. 9-10). In a return to the writ the Immigration Service, through its officer Lester Friedman, denied these allegations, and argued

[1] Lee Kum Cherk's name was erroneously transposed with that of Lee Moon Wah in the 13th finding of fact (R. 150) as the Board of Immigration Appeals noted in its subsequent opinion (R. 157).

that since the petitioners were accorded an opportunity to meet the blood test evidence by independent tests their contention that the hearing was unfair was not substantiated (R. 11-19).

On September 17, 1953, the District Court, through Judge Dimock, found after hearing that the petitioners had been denied sufficient opportunity to attack the blood test evidence, and directed that the writ should be sustained unless within 20 days the Board of Special Inquiry reopened the proceedings to afford petitioners this opportunity (R. 36-53; 115 F. Supp. 302).

On November 5, 1953, the Board of Special Inquiry again met, and on consent of the parties the hearing was transferred to a Special Inquiry Officer (R. 162-165). Dr. Sussman, a specialist on hematology (R. 168-169), testified on behalf of petitioners that the tests would exclude paternity of Lee Kum Hoy and Lee Moon Wah only if they were accurately made (R. 180-181). Counsel for petitioner was again given opportunity to conduct independent tests which he declined to do (R. 186-187). The Service then presented one of the transfusionists who had conducted the original blood tests. He testified that the second test had been correctly taken (R. 202). Dr. Cameron, the medical director of the Department of Pathology, United States Public Health Service, identified a circular from the Federal Security Agency entitled "Blood-type Testing on Request of the Immigration and Naturalization Service" dated May 8, 1952, relating to blood type testing of certain United States citizens of Chinese descent by the Public Health Service on behalf of the Immigration Service (R. 210-

211). Dr. Cameron testified that this circular constituted his authority for conducting such tests, and that the Health Service had tested about 200 Chinese persons (R. 212). The Special Inquiry Officer denied petitioners' request that an official of the Immigration Service be produced to testify as to a possible policy of that service to conduct blood tests only in cases involving Chinese applicants (R. 188-189, 222-223).

On December 9, 1953, the Special Inquiry Officer rendered his decision, again finding the petitioners inadmissible (R. 225-236). On April 12, 1954, the Board of Immigration Appeals granted petitioners an opportunity to reopen the record in order to cross-examine Dr. Wiener whose article on blood testing had been introduced in evidence. The Board also incorporated Dr. Wiener's testimony in a similar case as part of the record in this case (R. 237-238). On June 17, 1954, the Board of Immigration Appeals dismissed petitioners' appeal, and in a lengthy opinion (R. 237-273) found that authority existed for the taking of blood tests, and that no racial discrimination was involved in the blood testing (R. 265-270). Noting that petitioner had declined to take advantage of the opportunity to cross-examine Dr. Wiener, the Board ruled that petitioners had offered no satisfactory proof of identity to overcome the blood test evidence introduced by the service (R. 273).

Petitioners again sought release on writ of habeas corpus in the District Court. On August 31, 1954, Judge Dimock rendered a second opinion (R. 55-65; 123 F. Supp. 674) in which he found against peti-

tioners on their claim that immigration authorities (R. 59), "cannot in any case require submission to a blood test as a condition to admission as a child of an American citizen." He held, however, that if such a policy were applied only against persons of Chinese descent that would constitute a denial of due process of law, and he directed that the writ be sustained unless within 20 days the hearing be reopened to determine whether the Immigration Service was practicing discrimination against Chinese persons in giving blood tests where paternity was in issue (R. 63).

On the reopened hearing, Lester Friedman, an attorney-advisor in the office of the District Counsel, New York District, Immigration and Naturalization Service, testified as to service policy with respect to conducting blood tests in exclusion cases. The practice, he said, originated with the State Department when, because of the closing of consulates in Communist China, the Hong Kong consulate was "deluged with thousands of applications" for United States passports by persons claiming citizenship through birth in China to an American father, "almost all of which were predicated upon oral claims of relationship and identity without documentary evidence of a primary or secondary nature" (R. 280). Since almost all such persons were born in the remote interior of China, it was impossible for the consulate to conduct even the most superficial investigation of the claimed identity of these persons.

Mr. Friedman testified that only rarely do American fathers file marriage or birth records at American consulates in China and unlike the case of European

applicants there is very little documentary evidence of paternity available (R. 288-289). The problem is complicated by the fact that the vast majority of passport fraud cases occur among Chinese persons (R. 372-374). Many Chinese applicants have used "coaching books" or "Halgoons", which are extensive written summaries of the entire background of a family with minutely detailed facts concerning the family life, village, neighbors, schooling, and geography of the area where the common home is claimed (R. 369-370). When a Chinese child dies, it is a common practice to substitute another child in his place as an applicant for admission (R. 376).

To meet these problems the State Department enlisted the cooperation of the Public Health Service to conduct blood tests in such cases (R. 280-281, 286-287, 290-291). Thereafter the Immigration and Naturalization Service decided to use similar tests where identity and paternity were in issue. While this policy was established in 1952 or shortly before, because of the unique problem presented by many thousands of Chinese cases, the policy was never intended to extend only to Chinese cases but to every case where such evidence was pertinent to the issues (R. 282). Mr. Friedman testified that (R. 287) "it is the nature of the cases which determines the administrative policy as to the use of blood tests and not the race of the persons concerned."

At the time of petitioner's arrival there were no Service instructions relating to the use of blood tests. It was not until after the decision of the Board of Immigration Appeals in the case of *Lee Fay Fan*

(0300/423162, Feb. 25, 1953), which established the precedent, that instructions were issued relating to the use of blood tests (R. 310-311, 326). While these instructions mentioned the use of such tests in Chinese cases, they did not make the use of such tests exclusive to Chinese. In 1954 new instructions were issued predicating the requirements of blood testing on the nature of the case and the issue of paternity or relationship involved. Such tests now are uniformly requested of all applicants for admission who come here without documentary evidence of any kind and claim derivative citizenship on the basis of oral testimony (R. 291-292, 320-321, 326-327, 333). No special instructions have been issued with regard to the use of blood tests in exclusion hearings (R. 310-311, 327). While such tests have been requested principally in Chinese cases, that is because of the fact that it is in those cases that documentary evidence is lacking and not because of discrimination against Chinese (R. 282, 284, 287, 289-290, 320, 326, 333).[2]

On January 18, 1955, the Special Inquiry Officer found that no discrimination had been practiced in this case or generally. He ordered the applicants excluded from the United States (R. 382-391). On May 5, 1955, an appeal to the Board of Immigration Appeals was dismissed (R. 392-401).

After further consideration of the case in the District Court, Judge Dimock, in an opinion filed on August 8, 1955, (R. 70-77, 133 F. Supp. 850), held that

---

[2] Mr. Friedman cited four non-Chinese cases where blood testing had been used, at least two of which, however, involved Negroes (R. 283-284, 349, 356-357).

because of the fact that there had been discrimination in the use of blood tests in Chinese cases, petitioners were entitled to be discharged from custody. In his order, he not only sustained the writ but admitted the petitioners into the United States "as citizens thereof" (R. 116).

The Service took an appeal from this holding, and the petitioners a cross-appeal from Judge Dimock's ruling in his second decision (123 F. Supp. 674) that blood tests, in the absence of discrimination on racial grounds, may be utilized by the Immigration Service without specific statutory authority. In a majority opinion (Pet. 1a-9a) the Court of Appeals, in reversing the judgment below, held as follows (Pet. 7a-8a):

> * * * We overrule the relators' contention, raised by their cross-appeal, that evidence of the blood tests was improperly received because of lack of administrative authority to make use of blood tests. Even in the absence of express authority embodied in official rules or directives, we hold that in the situation here responsible official personnel had authority to utilize any non-discriminatory, investigatory technique reasonably appropriate. The ruling complained of is sustained and the order complained of by the cross-appeal is affirmed.
>
> We hold further that on the entire administrative record, only the salient portions of which are set forth above, the finding below that the testing of these relators was actuated by racial discrimination, was not warranted. It is true that in the 1952-1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any non-Chinese case

> or of Chinese admitted without blood testing. Nevertheless we think it more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult cases. * * *

While Judge Frank concurred in the affirmance on petitioners' cross-appeal, he dissented from the reversal of the District Court's ruling on the discrimination issue (Pet. 10a-16a).

ARGUMENT

1. Petitioners contend that the blood tests, on which the finding against their claim of citizenship rests, were discriminatory in that they were held during a two-year period (1952-1953) during which such tests were given only to persons of Chinese origin (Pet. 7-13). This record establishes, however, that the use of such tests was not directed against Chinese because of their race or color, but because of the particular circumstances in China which created special problems. The use of a special technique to meet a special problem is not unconstitutional discrimination. *Cf. National Labor Relation Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 46.

The special problem happened to relate to Chinese because of the political situation in China and the absence of the kind of records that are normally available for other groups. During the period in question,

with the consulates in Communist China closed, thousands of applicants from remote areas in China were presenting to the consulate in Hong Kong applications for admission to the United States, without travel documents and without records of birth and parentage. It was impossible for consular officials to gain access to the interior areas to investigate the claims. The existence of schemes to prepare claimants on the details of village life, so as to substantiate their claims (see the Statement, *supra,* p. 9) was known. Under these special circumstances, the State Department developed, and the Immigration Service adopted, the policy of requesting blood tests as part of the effort of the applicants to establish their affirmative claim to American citizenship. The policy developed in Chinese cases because the problems which rendered the policy appropriate arose out of the special circumstances of Chinese government and history. The problem of paternity arises rarely as to other groups and never with all the particular difficulties that resulted from the political developments in China.

Under these circumstances this record fails to substantiate petitioners' claim that blood testing in the 1952-1953 period by the Immigration and Naturalization Service was "unjustifiable" or "based solely upon race," or "was, as an unreasonable discrimination, a denial of due process." The conclusion that the policy was not unconstitutionally discriminatory reached by the Court of Appeals in the instant case, and in its prior opinions in *Dong Wing Ott* v. *Shaughnessy,* 220 F. 2d 537, certiorari denied, 350 U.S. 847, and *Lue Chow Kon* v. *Brownell,* 220 F. 2d 187, is amply justified.

2. Petitioners contend also that because no authority was expressly given immigration officials to conduct blood tests either by statute or regulation, the tests in this case were unlawful (Pet. 11-13).

The burden of proof was, however, on petitioners to establish their claim to citizenship, and a request that they submit this proof in support of their claim was reasonable. Petitioners made no objection to taking the tests which were administered as a matter of course (R. 57).

There can be no doubt that blood testing is a valid procedure both under Rule 35 of the Federal Rules of Civil Procedure (*Beach* v. *Beach*, 114 F. 2d 479 (C.A. D.C.), and under the Civil Practice Act of New York, where the exclusion proceeding was held. *Lue Chow Kon* v. *Brownell*, 220 F. 2d 187 (C.A. 2); *Dong Wing Ott* v. *Shaughnessy*, 220 F. 2d 537, 540. The Board of Immigration Appeals in a precedent decision has ruled that blood testing is a proper procedure in exclusion cases of this type. *In the Matter of Lee Fan* (0300/423162, February 25, 1953). While there was no express authority given the Immigration Service to conduct such tests as an investigative technique in this case beyond its general investigative authority, immigration authorities are not bound by the same strict rules of evidence which limit judicial authority or to particular modes of informing themselves as to facts. *Kwong Han Foo* v. *Ward*, 126 F. 2d 615 (C.A. 1); *Jung Yen Loy* v. *Cahill*, 81 F. 2d 809 (C.A. 9); *Berkman* v. *Tillinghast*, 58 F. 2d 621 (C.A. 1); *Gung You* v. *Nagle*, 34 F. 2d 848 (C.A. 9); *Mason ex rel. Lee Wing You* v. *Tillinghast*, 27 F. 2d 580 (C.A. 1);

United States ex rel. Chew Deck v. *Commissioner*, 17 F. Supp. 78 (S.D. N.Y.), affirmed, 86 F. 2d 1020 (C.A. 2), certiorari denied, 300 U.S. 666. This Court has held that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143.

The use of blood tests was a logical method of investigation in the particular circumstances of this case and could not be said to be so unfair as to be violative of the fundamental principles of justice embraced within the conception of due process of law. *Kwong Han Foo* v. *Ward, supra* (126 F. 2d at p. 618).

3. Petitioners also attack the results of the blood tests as unreliable and insufficient to refute their parentage. Blood test evidence as a method of excluding the possibility of parentage is now well established. *Beach* v. *Beach, supra; Lue Chow Kon* v. *Brownell, supra; Wong Fuey Ying* v. *Dulles*, 137 F. Supp. 470, 472 (D. Mass.). As to the reliability of the particular tests or what they proved, petitioners were afforded ample opportunity to refute the evidence in the administrative proceedings and failed to do so. This attack on the mere weight of the evidence does not come within the scope of collateral review. *Eagles* v. *United States*, 329 U.S. 304; *Sunal* v. *Large* 332 U.S. 174.

CONCLUSION

The petition for a writ of certiorari presents no conflict of decision or question meriting further review by this Court. It should therefore be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
CARL H. IMLAY,
Attorneys.

DECEMBER 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956—409640/P.O. 599

FILED
SEP 25 1957
JOHN T. FEY, Clerk

No. 32

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA EX REL. LEE KUM HOY, ET AL., PETITIONERS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	12
Argument	18
I. The use of blood-tests in passing on petitioners' claims of derivative citizenship was not discriminatory; the practice was first adopted with respect to Chinese claimants because of the peculiar problems such cases presented	19
A. The number of claims to derivative citizenship by Chinese applicants in 1951 represented a special immediate problem for consular officers in Hong Kong	19
B. The usual techniques of checking claims to derivative citizenship were inadequate for this type of clair	24
C. After blood-testing techniques were found helpful in meeting the problems of identity and paternity in cases which were concentrated in the Hong Kong area, the technique was utilized generally	32
II The use of a special technique to meet a special problem is not unconstitutional discrimination	34
III Even if blood-testing had been erroneously limited, there would be no reason to exclude the evidence in this case	41
Conclusion	41

CITATIONS

Cases:

Bolling v. *Sharpe*, 347 U.S. 497	16, 36
Breithaupt v. *Abram*, 352 U.S. 432	32
Brownell v. *Lee Mon Hong*, 217 F. 2d 113	22
Chin Wing Gwong v. *Dulles*, 139 F. Supp. 116	28
Chow Sing v. *Brownell*, 217 F. 2d 140	22

Cases—Continued

	Page
Detroit Bank v. *United States*, 317 U.S. 329	36
Dong Wing Ott v. *Shaughnessy*, 116 F. Supp. 745, affirmed, 220 F. 2d 537, certiorari denied, 350 U.S. 847	23, 27, 37
Hee Fuk Yuen v. *White*, 273 Fed. 10, certiorari denied, *sub nom. Pang Hing* v. *White*, 257 U.S. 639	38
Hirabayashi v. *United States*, 320 U.S. 81	35, 36
Hom Ark v. *Carr*, 105 F. 2d 607	31
Hurd v. *Hodge*, 334 U.S. 24	36
Hurwitz v. *North*, 271 U.S. 40	34
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61	34
Lue Chow Kon v. *Brownell*, 122 F. Supp. 370, affirmed, 220 F. 2d 187	30, 37
Ly Shew v. *Acheson*, 110 F. Supp. 50, vacated and remanded *sub nom. Ly. Shew* v. *Dulles*, 219 F. 2d 413	23, 25, 28, 29
Ly Shew v. *Dulles*, No. 14,768, June 23, 1956	24
Mah Ying Og v. *McGrath*, 187 F. 2d 199	22, 23
Mar Gong v. *McGranery*, 109 F. Supp. 821, reversed, *sub nom. Mar Gong* v. *Brownell*, 209 F. 2d 448	24, 27
Medeiros, United States ex rel. v. *Watkins*, 166 F. 2d 897	22
Metropolitan Co. v. *Brownell*, 294 U.S. 580	34
Middleton v. *Texas Power & Light Co.*, 249 U.S. 152	34
Miller v. *Wilson*, 236 U.S. 373	34
Missouri v. *Lewis*, 101 U.S. 22	34
National Labor Relations Board v. *Jones & Laughlin*, 301 U.S. 1	16, 34
Quan Hing Sun v. *White*, 254 Fed. 402	42
Satsburg v. *Maryland*, 346 U.S. 545	34
Semler v. *Dental Examiners*, 294 U.S. 608	34
Soo Hoo Yin Deep v. *Dulles*, 116 F. Supp. 25	28
Steele v. *L. & N. R. Co.*, 323 U.S. 192	36
Steward Machine Co. v. *Davis*, 301 U.S. 548	35, 40
Sunshine Coal Co. v. *Adkins*, 310 U.S. 381	35
Thiel v. *Southern Pacific Co.*, 328 U.S. 217	36
United States v. *Ju Toy*, 198 U.S. 253	22
United States v. *Petrillo*, 332 U.S. 1	16, 35, 36, 40
Watson v. *Maryland*, 218 U.S. 173	34

Cases—Continued Page

West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 34
Wong Chong Oy v. *Dulles*, 132 F. Supp. 483 31
Wong Fook Ngoey v. Nagle, 300 Fed. 323 31
Wong Suey Ming v. *Dulles*, 130 F. Supp. 905 28

Constitution and statutes:

Constitution of the United States:
Fourth Amendment 41
Fifth Amendment 15, 34, 35, 36
Fourteenth Amendment 15, 34
Act of May 6, 1882, 22 Stat. 58 21
Act of December 17, 1943, 57 Stat. 600 21
Communications Act of 1934, as amended, Sec. 506(a)(1), 60 Stat. 89 35
Immigration and Nationality Act of 1952, Sec. 360(a), 66 Stat. 273, 8 U.S.C. 1503(a) 22
Nationality Act of 1940, Sec. 503, 54 Stat. 1171, 8 U.S.C. (1946 ed.) 903 ..... 21, 22, 23
R. S. 1993 42
58 Stat. 1125 21

Miscellaneous:

Annual Report of the Attorney General of the United States (1956) pp. 111-113 ..... 29, 30
Briggs, *American Consular Rights in Communist China*, 44 Am. Jour. of Int. Law 243 26
Corwin, *The Constitution of the United States of America*, Senate Document No. 170, 82d Cong., 2d sess. (1953 ed.):
1145-1146 34
1153-1156 34
Manual for Medical Examination of Aliens, issued by United States Public Health Service 38-39
Schatkin, Sussman & Yarbrough, *Blood Test Evidence In Detecting False Claims of Citizenship*, 3 Cr. L. Rev. (Autumn 1956) 45 31-32
Schatkin, Sussman and Yarbrough, *Chinese Immigration and Blood Tests*, 2 Cr. L. Rev. (Spring 1955) 44 ..... 20, 23, 25, 28-29, 30, 31
Tyler, *Immigration and the United States* (1956) 29 21

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 32

UNITED STATES OF AMERICA EX REL. LEE KUM HOY, ET AL., PETITIONERS

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the Court of Appeals are reported at 237 F. 2d 307. The three opinions of the District Court are reported at 133 F. Supp. 850, 123 F. Supp. 674, and 115 F. Supp. 302.

JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1956. The petition for a writ of certiorari was filed on November 2, 1956, and granted on January 14, 1957 (352 U.S. 966),

limited to the question stated below. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was unconstitutional discrimination against petitioners by the use of blood tests in determination of their application for entry into this country.

STATEMENT

Petitioners seek review of the judgment of the Court of Appeals reversing the order of the District Court which had granted a writ of habeas corpus and admitted petitioners to the United States as citizens (R. 115-116).

The evidence and the proceedings in this case may be summarized as follows:

On June 17, 1952, the petitioners, two boys and a girl aged 21, 13, and 12 respectively, arrived in New York from Hong Kong (R. 131, 148, 149). The three claimed to be the children of Lee Ha (an American citizen) and his wife Wong Tew Hee [1] (an alien), to whom the alleged father was married in China in 1923 (R. 149).

The case was referred to a Board of Special Inquiry and a hearing was commenced on August 14, 1952 (R. 123). Petitioners, who were represented by counsel, were informed that the burden was upon them to establish that they were admissible (R. 124).

---

[1] Also variously referred to in the proceedings as Tew Hee Wong and Hee Tew Wong.

They testified that they were born in the Toishan District of China (R. 125), and that they had never before been in the United States (R. 131). Lee Ha, the claimed citizen father, and Wong Tew Hee, the alleged mother, testified in support of their claimed relationship to the children and to each other (R. 134, 136). The petitioners and the alleged parents were questioned in detail as to their alleged common home in Lung Woy Village, Toishan District, China (R. 126-130, 134-135, 137).

The immigration inspector introduced into evidence the results of two blood tests taken of the three petitioners and the alleged parents by the United States Public Health Service on two occasions prior to the hearing (R. 131-133, 135, 136). The tests showed that each of the claimed parents was in blood group "A", while Lee Moon Wah, and Lee Kum Hoy were in blood group "B", and Lee Kum Cherk was in blood group "O" (R. 150). The Service inspector also introduced into evidence an article in the United States Law Review entitled "Blood Grouping Tests in the New York Courts" by Alexander S. Wiener, M.D. (R. 137) from which it appeared that, on the basis of the blood test results, the petitioners Lee Moon Wah and Lee Kum Hoy could not be related to the claimed parents (R. 137, 150). Petitioners' counsel objected to the introduction into evidence of both the blood test results and the article by Dr. Wiener (R. 133, 140). A request that Dr. Wiener be produced for cross-examination was denied (R. 140).

Petitioners were, however, granted a continuance

until September 18, 1952, in order that they might have independent blood tests made to meet the evidence adduced by the Service (R. 140-141). On that date petitioners' counsel withdrew his request for independent blood tests and reiterated his request to cross-examine Dr. Wiener, which request was again denied (R. 143-144).

The Board of Special Inquiry then rendered its exclusion order, finding, *inter alia*, that while the oral testimony of the witnesses as to their claimed common home in China was "reasonably harmonious and reasonably consistent with the records of the Immigration and Naturalization Service", the blood tests excluded the possibility that Lee Moon Wah and Lee Kum Hoy were the children of the claimed parents. It further ruled that, while the claimed parentage was possible in the case of Lee Kum Cherk,[2] his credibility was impeached by the results of the blood tests, since if the other two children were not the children of the alleged parents, he could not be both their brother and the son of the alleged parents (R. 149-151).

On May 11, 1953, the Board of Immigration Appeals, concurring in the findings of the Board of Special Inquiry, dismissed petitioners' appeal (R. 154-160).

On July 13, 1953, Lee Ha, the alleged father, filed a petition for a writ of habeas corpus in the United

---

[2] Lee Kum Cherk's name was erroneously transposed with that of Lee Moon Wah in the 13th finding of fact (R. 150) as the Board of Immigration Appeals noted in its subsequent opinion (R. 157).

States District Court for the Southern District of New York alleging, *inter alia*, that, although the present petitioners were citizens, they were about to be deported to China; and that they had not had a fair hearing in the exclusion proceedings by virtue of the fact that they had not been allowed to examine the qualifications of the unidentified individuals who conducted the blood tests, or the author of the article on blood tests introduced into evidence (R. 5-9). In an amendment to this petition (R. 9-10) it was also alleged that the blood tests given petitioners were taken without the authority of any statute, rule, or regulation by the Immigration and Naturalization Service, and that such tests were required only of Chinese persons seeking admission and their parents and not of persons of other races (R. 9-10). In a return to the writ, the Immigration and Naturalization Service, through its attorney Lester Friedman, denied these allegations, and argued that since the petitioners were accorded an opportunity to meet the blood test evidence by independent tests their contention that the hearing was unfair was not substantiated (R. 11-19).

On September 17, 1953, the District Court (Judge Dimock) found, after hearing, that the petitioners had been denied sufficient opportunity to attack the blood test evidence, and directed that the writ should be sustained unless within 20 days the Board of Special Inquiry reopened the proceedings to afford petitioners this opportunity (R. 36-53; 115 F. Supp. 302).

On November 5, 1953, the Board of Special In-

quiry again met, and on consent of the parties the hearing was transferred to a Special Inquiry Officer (R. 162-165). Dr. Sussman, a specialist on hematology (R. 168-169), testified on behalf of petitioners that the tests would exclude paternity of Lee Kum Hoy and Lee Moon Wah only if they were accurately made (R. 180-181). Counsel for petitioners was again given opportunity to conduct independent tests which he declined to do (R. 186-187). The Service then presented one of the transfusionists who had conducted the original blood tests. He testified that the second test had been correctly taken (R. 202). Dr. Cameron, the medical director of the Department of Pathology, United States Public Health Service, identified a circular from the Federal Security Agency entitled "Blood-type Testing on Request of the Immigration and Naturalization Service" dated May 8, 1952, relating to blood type testing of certain United States citizens of Chinese descent by the Public Health Service on behalf of the Immigration Service (R. 210-211). Dr. Cameron testified that this circular constituted his authority for conducting such tests, and that the Health Service had tested about 200 Chinese persons (R. 212). The Special Inquiry Officer denied petitioners' request that an official of the Immigration Service be produced to testify as to a possible policy of the Service to conduct blood tests only in cases involving Chinese applicants (R. 188-189, 222-223).

On December 9, 1953, the Special Inquiry Officer rendered his decision, again finding the petitioners inadmissible (R. 225-236). On April 12, 1954, the

Board of Immigration Appeals granted petitioners an opportunity to reopen the record in order to cross-examine Dr. Wiener whose article on blood testing had been introduced in evidence. The Board also incorporated Dr. Wiener's testimony in a similar case as part of the record in this case (R. 237-238). On June 17, 1954, the Board of Immigration Appeals dismissed petitioners' appeal, and in a lengthy opinion (R. 237-273) found that authority existed for the taking of blood tests, and that no racial discrimination was involved in the blood testing (R. 265-270). Noting that petitioners had declined to take advantage of the opportunity to cross-examine Dr. Wiener, the Board ruled that petitioners had offered no satisfactory proof of identity to overcome the blood test evidence introduced by the Service (R. 273).

Petitioners again sought release on writ of habeas corpus in the District Court. On August 31, 1954, Judge Dimock rendered a second opinion (R. 55-65; 123 F. Supp. 674) in which he found against petitioners on their claim that immigration authorities (R. 59) "cannot in any case require submission to a blood test as a condition to admission as a child of an American citizen." He held, however, that if such a policy were applied only against persons of Chinese descent that would constitute a denial of due process of law, and he directed that the writ be sustained unless within 20 days the hearing be reopened to determine whether the Immigration Service was practicing discrimination against Chi-

nese persons in giving blood tests where paternity was in issue (R. 63).

On the reopened hearing, Lester Friedman, an attorney-advisor in the office of the District Counsel, New York District, Immigration and Naturalization Service, testified as to Service policy with respect to conducting blood tests in exclusion cases. The practice, he said, originated with the State Department when, because of the closing of consulates in Communist China, the Hong Kong consulate was "deluged with thousands of applications" for United States passports by persons claiming citizenship through birth in China to an American father, "almost all of which were predicated upon oral claims of relationship and identity without documentary evidence of a primary or secondary nature" (R. 280). Since almost all such persons were born in the remote interior of China, it was impossible for the consulate to conduct even the most superficial investigation of the claimed identity of these persons.

Mr. Friedman testified that only rarely do American fathers file marriage or birth records at American consulates in China and, unlike the case of European applicants, there is very little documentary evidence of paternity available (R. 288-289). The problem is complicated by the fact that the vast majority of passport fraud cases occur among Chinese persons (R. 372-374). Many Chinese applicants have used "coaching books" or "Halgoons", which are extensive written summaries of the entire background of a family with minutely detailed facts concerning the family life, village, neighbors, schooling, and geo-

graphy of the area where the common home is claimed (R. 369-370). When a Chinese child dies, it is a common practice to substitute another child in his place as an applicant for admission (R. 376).

To meet these problems the State Department enlisted the cooperation of the Public Health Service to conduct blood tests in such cases (R. 280-281, 286-287, 290-291). Thereafter, the Immigration and Naturalization Service decided to use similar tests where identity and paternity were in issue. While this policy was established in 1952 or shortly before, because of the unique problem presented by many thousands of Chinese cases, the policy was never intended to extend only to Chinese cases but to every case where such evidence was pertinent to the issues (R. 282). Mr. Friedman testified that (R. 287) "it is the nature of the cases which determines the administrative policy as to the use of blood tests and not the race of the persons concerned."

At the time of petitioners' arrival from Hong Kong in June 1952, there were no Service instructions relating to the use of blood tests. It was not until after the decision of the Board of Immigration Appeals in the case of *Lee Fay Fan* (0300/423162, Feb. 25, 1953), which established the precedent, that instructions were issued relating to the use of blood tests (R. 310-311, 326). While these instructions mentioned the use of such tests in Chinese cases, they did not make the use of such tests exclusive to Chinese. In 1954 new instructions were issued predicating the requirements of blood testing on the nature of the case and the issue of paternity or relationship

involved. Such tests now are uniformly requested of all applicants for admission who come here without documentary evidence of any kind and claim derivative citizenship on the basis of oral testimony (R. 291-292, 320-321, 326-327, 333). No special instructions have been issued with regard to the use of blood tests in exclusion hearings (R. 310-311, 327). While such tests have been requested principally in cases involving Chinese, that is because of the fact that it is in those cases that documentary evidence is lacking and not because of discrimination against Chinese (R. 282, 284, 287, 289-290, 320, 326, 333).[3]

On January 18, 1955, the Special Inquiry Officer found that no discrimination had been practiced in this case or generally. He ordered the applicants excluded from the United States (R. 382-391). On May 5, 1955, an appeal to the Board of Immigration Appeals was dismissed (R. 392-401).

After further consideration of the case in the District Court, Judge Dimock, in an opinion filed on August 8, 1955, (R. 70-77, 133 F. Supp. 850), held that because of the fact that there had been dis-

---

[3] Mr. Friedman cited four non-Chinese cases where blood testing had been used (R. 283-284). Petitioners sought to obtain from him the admission that these were Negroes. He did not know (R. 351-352). In further questioning concerning two of the applicants, the following colloquy occurred:

"Q. Do you know whether they were British subjects from the British West Indies? A. Yes, they were.

"Q. Don't you think it likely that they were Negroes? A. It's quite possible judging from the name and the place of birth." (R. 356-357).

crimination in the use of blood tests in Chinese cases, petitioners were entitled to be discharged from custody. In his order, he not only sustained the writ but admitted the petitioners into the United States "as citizens thereof" (R. 116).

The Service took an appeal from this holding, and the petitioners a cross-appeal from Judge Dimock's ruling in his second decision (123 F. Supp. 674) that blood tests, in the absence of discrimination on racial grounds, may be utilized by the Immigration and Naturalization Service without specific statutory authority. In a majority opinion (Pet. 1a-9a) the Court of Appeals, in reversing the judgment below, held as follows (Pet. 7a-8a):

> * * * We overrule the relators' contention, raised by their cross-appeal, that evidence of the blood tests was improperly received because of lack of administrative authority to make use of blood tests. Even in the absence of express authority embodied in official rules or directives, we hold that in the situation here responsible official personnel had authority to utilize any non-discriminatory, investigatory technique reasonably appropriate. The ruling complained of is sustained and the order complained of by the cross-appeal is affirmed.
>
> We hold further that on the entire administrative record, only the salient portions of which are set forth above, the finding below that the testing of these relators was actuated by racial discrimination, was not warranted. It is true that in the 1952-1953 period there was evidence of 500 actual cases in which Chinese had been tested and no evidence of blood testing in any

> non-Chinese case or of Chinese admitted without blood testing. Nevertheless we think it more reasonable in the light of the administrative record, to attribute this apparent discrimination not to discrimination in fact but, rather, to the fact that in this early period the blood test technique first became known to investigators chiefly concerned with Chinese cases who were actuated to use it not because of racial prejudice but by a proper police motive for their aid in the solution of difficult cases. * * *.

While Judge Frank concurred in the affirmance on petitioners' cross-appeal, he dissented from the reversal of the District Court's ruling on the discrimination issue (Pet. 10a-17a).

SUMMARY OF ARGUMENT

I

The use of blood tests in passing on petitioners' claims of derivative citizenship was not discriminatory.

A. The practice was first adopted with respect to Chinese claimants because of the peculiar problems such cases presented.

1. In 1951, almost all the American consulates in China were closed and thousands of Chinese were congregated at Hong Kong asserting claims to derivative American citizenship. The overwhelming majority of these applications were based on oral claims without corroborative documentary evidence; furthermore, the applicants almost uniformly came from the interior of China so that only the most cursory in-

vestigation of their oral assertions would have been possible—and even this was foreclosed by the political climate of the times. It was against this background that the State Department, in the latter part of 1951, initiated, at Hong Kong, the investigatory technique of blood testing to aid in ascertaining the validity of claims to derivative American citizenship.

B. The history of Chinese migration to the United States has given rise to unique problems in establishing the true identity of claimants to derivative citizenship and presented a behavior pattern which permitted easy opportunity for fraud.

1. From 1882 to 1943, most Chinese were completely excluded and all Chinese were barred from becoming naturalized citizens. During this period, it was usual for American male citizens of Chinese descent to go to China, marry there, have children, and then return alone to the United States. The American father would report the birth of his children to the immigration authorities on his return to the United States, and many of the children, especially the sons, later sought admission to the United States.

2. Opportunities for fraud arose because of several factors. The father had either never seen his alleged children, or had seen them only when they were quite young. The applicants, generally coming from rural villages deep in China, not marked on available maps, had no birth certificates nor corroborating documentary identification to support their oral claims. In this respect, the situation radically differed from that of the usual non-Chinese

mitted without blood tests prior to June 6, 1952 (R. 98a-99a). This evidence, belatedly produced by the Service from its files, reenforces the fact that during the period in question all Chinese persons and no white persons were blood tested.

On this record and on the basis of the three administrative hearings Judge Dimock in his third opinion correctly found (R. 71a-72a):

> "It has become so clear that the policy of the Immigration Authorities is to apply blood tests to all Chinese and to no whites that even the presumption of administrative finality will not support a determination to the contrary. The Government has been unable to point to a single instance where a white person has been subject to a blood test or a Chinese excused from one."

The court below conceded that "there was evidence of 500 actual cases in which Chinese had been tested and *no evidence* of blood testing in any non-Chinese case or of Chinese admitted without blood testing" (R. 420a, emphasis supplied).

Extensive argument is not necessary or appropriate in this Court to establish the unconstitutionality of a special federal administrative procedure to determine the claims of United States citizenship of persons of Chinese ancestry more strict than the general procedure applicable to persons of all other ancestry. *Jeong Quey How* v. *White*, 258 Fed. 618 (C. C. A. 9); *Quan Hing Gun* v. *White*, 254 Fed. 402 (C. C. A. 9). This is not the first instance in which judicial intervention has been necessary to protect Chinese persons from racial discrimination in the application of

immigration laws and regulations[2] and other laws and regulations.[3]

The petitioners submit that the record incontrovertibly established, as both courts below found, that petitioners were blood tested pursuant to an administrative practice of blood testing all Chinese and no white persons seeking admission to the United States as citizens. The petitioners completely carried their burden of proof on the issue and the respondent failed wholly to support his contention that persons other than Chinese were blood tested, or even that some Chinese were not blood tested during the period in which petitioners were blood tested. These blood tests should be judicially condemned as unconstitutional and the petitioners finally admitted to the United States as citizens on the basis of all the other evidence, concededly sufficient without the disputed blood tests (R. 76a, 149a-150a, 155a),[4] unless the record presents the issue of and establishes a legal justification for blood testing all Chinese and no white persons.

---

[2] See *Ly Shew* v. *Dulles*, 219 F. 2d 413 (C. A. 9); *Yuen Boo Ming* v. *United States*, 103 F. 2d 355 (C. A. 9); *Ex parte Tom Toy Tin*, 230 Fed. 747 (N. D. Cal.); *Ex parte Lee Dung Moo*, 230 Fed. 746 (N. D. Cal.).

[3] See *Wong Wing* v. *United States*, 163 U. S. 235 (federal statute providing for condemnation to hard labor without jury trial); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (laundry ordinance); *Wong Wai* v. *Williamson*, 103 Fed. 1 (C. C. N. D. Cal., bubonic plague ordinance); *In re Tiburcio Parrott*, 1 Fed. 481 (C. C. D. Cal., prohibition against employment of Chinese); *Ho Ah Kow* v. *Noonan*, 5 Sawy. 552, 12 Fed. Cas. No. 6546 (C. C. Cal., queue ordinance); *Opinion of the Justices*, 207 Mass. 601 (prohibition against girls and young women patronizing Chinese hotels and restaurants).

[4] Certiorari was not granted upon petitioners' contention that the petitioners' blood tests were inaccurate and conflicting and that any reliance upon them denied petitioners due process of law (Petition 13-15). Such disputed blood tests are properly ignored as a basis for denying United States citizenship. *Lee Wing Hong* v. *Dulles*, 214 F. 2d 753, 759 (C. A. 7).

II.

On the record there was no legal justification for blood testing all Chinese and no white persons.

In view of respondent's contention throughout the case that some white persons were blood tested and that all Chinese were not blood tested during the period involved and the administrative trial and District Court review of that issue of fact it is not entirely clear to petitioners' counsel that any defense of factual justification of blood testing only Chinese, adopted for the first time by the court below, is available to respondent on this record in this Court. Therefore petitioners contend separately (A) that the defense of justification of blood testing only Chinese is not now available to the respondent; (B) that the record does not establish any factual justification and (C) that lack of conscious racial prejudice is no legal justification.

A. *The Issue of Factual Justification for Blood Testing All Chinese and Only Chinese Is Not Presented.*

The factual issue tried administratively and reviewed by the District Court was whether in fact all Chinese and no white persons were blood tested. The respondent first contended that blood tests were required of all applicants, Chinese and non-Chinese, who lacked birth certificates or other documentary proof of paternity (R. 15a, 72a, 332a), and thus tried to prove that blood testing was not restricted to Chinese although respondent's representatives might fairly be charged with knowing otherwise. The petitioners overcame this contention with evidence that all Chinese, including those born in Hong Kong and with birth certificates issued by the British authorities there, were also

blood tested.[5] Confronted with this evidence respondent then claimed that not the absence of documentary proof of paternity but the unavailability of a consular investigation at the place of the applicant's birth was the factor which determined whether a blood test should be given. The testimony of the Government's witness to this effect was also offered to prove that blood tests were not restricted to Chinese although this was not the fact. The petitioners were required to satisfy the burden of proof on the issue whether blood testing was restricted to Chinese or was extended to other persons and were not placed on notice that they were also required to produce evidence on the different issue that if blood testing were restricted to Chinese the practice was legally justified by factual conditions in China or other factual considerations. The testimony of the Government was not offered on the issue of justification although some of the testimony might have been relevant on that issue if it had been involved. In this posture of the record the petitioners submit that the case should be decided solely on the issue whether blood tests were restricted to Chinese and since in fact they were so restricted the blood tests of petitioners should be ruled in-

---

[5] Petitioners, denied any access to the records of the Service, were unable to prove specific cases of white persons without birth certificates or other documentary evidence of paternity who were admitted without blood tests, but on this record it is a fair inference that such applicants were admitted without blood tests because the Government failed to show one case of blood testing of a white person prior to January 10, 1955 (R. 96a) after the District Court condemned blood testing of all Chinese aliens alone. Surely not every white applicant from the war disturbed areas of Europe before January 1955 were able to produce birth certificates or similar documents. The respondent's failure and refusal upon demand to produce any evidence of a white person being blood tested during the period in question supports an inference that white persons without documents were admitted without blood tests during that period. If there were reason to blood test white persons after January 10, 1955 surely similar reasons for such blood tests existed between June 1952 and December 1954.

admissible and on that basis the petitioners should be admitted as citizens.

B. *The Record Does Not Establish Any Factual Justification for Blood Testing Only Chinese.*

Even if the testimony offered by the Government to prove that blood testing was not restricted to Chinese be considered by this Court on the different issue whether there is any factual justification for blood testing only Chinese the petitioners submit that no such justification was established. Judge Frank in his dissenting opinion particularly noted (R. 423a) that Judge Dimock had pointed out how the Government kept shifting its position first by claiming that blood tests were required in all cases where there were no birth certificates or other documents of identity, and when this contention was disproved by cases of Chinese who were blood tested notwithstanding their birth certificates then by contending that blood tests were required when the applicants were born in places inaccessible to a consular investigation (R. 72a-74a). The petitioners, however, submitted five cases (Exhs. 27-31 inclusive, R. 402a-413a) of Chinese born in Hong Kong with birth certificates and . cessible for consular investigation who were subjected to blood tests (R. 74a-76a). In each of these cases the parents were married in Hong Kong, the child had never been to China, and there was presented to the American Consul a British marriage certificate of the parents and a contemporaneous birth certificate for the child and the mother and child were living in Hong Kong and the American Consul could and did conduct an extensive investigation. The oldest child blood tested in this case was six years of age and two of the children were less than a year and a half old at the time they were blood tested. Thus the testimony wholly failed to supply any justification in fact for blood testing only Chinese and in fact affirmatively

established that there was no justification and that the blood testing was based on obvious racial discrimination.

It is true that the Government's witness at the last administrative hearing, commencing October 28, 1954, in addition to his principal testimony seeking to establish that blood testing was not restricted to Chinese (R. 282a-283a), entirely discredited on cross-examination (R. 357a-358a, 377a), at the conclusion of his testimony made a general hearsay statement over objection (R. 367a, 369a-370a) referring to some general judicial comments in another case about statistics of fraud in Chinese citizenship cases (R. 372a) and concluded that although the vast proportion of Chinese applicants were admitted as citizens there was a large incidence of fraud in Chinese cases (R. 366a, 373a).[6] Neither the decision of the Special Inquiry Officer (R. 389a-391a) nor the decision of the Board of Immigration Appeals (R. 392a-401a) conceded that only Chinese were blood tested or relied upon this general testimony of the Government attorney as factual justification for blood testing only Chinese. On the contrary the Board of Immigration Appeals concluded its opinion with the statement that "on the issue of racial discrimination, we believe the instant case should be required to stand on its own bottom, not on the study of other cases which may or may not be similar" (R. 400a). Thus it does not appear that any issue of factual justification for blood testing only Chinese was either tried or determined administratively or in the District Court. The Court of Appeals, however, did refer to the Government attorney's general testimony about alleged fraud in other Chinese cases (R. 417-419). The petitioners submit that this general hearsay testimony, even if

[6] *Margong* v. *Brownell*, 109 F. Supp. 821 (N.D. Cal.), reversed 209 F. 2d 448, 453 because of the trial court's reliance upon its experience in cases other than the case on trial.

entitled to any weight at all, did not supply a factual justification for blood testing all Chinese but, at the most, only Chinese without documentary proof of paternity and from areas where a consular investigation could not be conducted. This testimony supplied no factual justification at all for blood testing Chinese born in Hong Kong and possessing trustworthy documentary evidence of paternity and available for and subjected to intensive consular investigation. Thus this testimony wholly fails to justify blood testing all Chinese. Moreover, since the Government throughout the case insisted erroneously that persons other than Chinese were blood tested petitioners never had the opportunity to offer evidence, which would have to come largely from the Service files, of the incidence of fraud in non-Chinese citizenship cases in order to establish that there is no factual basis for treating Chinese differently than other persons on the basis of an alleged greater incidence of fraud. This Court has admonished that any governmental regulation aimed at one race is prima facie unconstitutional and only the most compelling factual circumstances will justify it. *Oyama* v. *California*, 332 U. S. 633. The petitioners submit that any factual justification relied upon by the court below if available at all on this record was wholly insufficient to justify the racially discriminatory practice.

C. *Lack of Conscious Race Prejudice Does Not Validate the Discriminatory Practice.*

The court below approved the practice of blood testing only Chinese, conceded by the court to be established by the evidence (R. 420), not upon any factual justification of the discrimination but rather upon the asserted legal ground that the special treatment of all Chinese was not "actuated by racial discrimination" (R. 419) or by "racial

prejudice" (R. 419-420). The court added that even if occasional prejudice by individual officers of the Service were deemed proved it did not follow that responsible officers "had consciously, in 1952, adopted a discriminatory policy" (R. 421). This Court, however, has repeatedly ruled that racial discrimination once established cannot be condoned because of failure to prove that the officials involved were consciously motivated solely by an odious racial prejudice rather than by some more socially palatable motive. *Hernandez* v. *Texas*, 347 U. S. 475, 482; *Avery* v. *Georgia*, 345 U. S. 559, 562, 563-564; *Patton* v. *Mississippi*, 332 U. S. 463; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 418; *Norris* v. *Alabama*, 294 U. S. 587, 598; *Hill* v. *Texas*, 316 U. S. 400, 401; *Holland* v. *Edwards*, 307 N. Y. 38, 45. These cases establish the rule that if the individual aggrieved proves that persons of one race are subject to discriminatory treatment he is not required to go further and prove an evil state of mind of the Government officials involved. The burden of proof shifts and the officials are required to justify the discrimination. If constitutional protection against racial discrimination is to be meaningful justification cannot be supplied by general statements of good intentions or general disclaimers of racial prejudice. It is submitted that in the instant case no justification has been presented for the proved racially discriminatory practice of blood testing only Chinese and all Chinese and no white persons between June 1952 and December 1954. On the contrary, the evidence that sixty white persons were blood tested between January 10, 1955 and August 4, 1955 (R. 96a-98a) proves that any factual criteria reasonably requiring blood tests apply to white persons as well as to Chinese and that the prior blood testing of all Chinese and no white persons was based not upon the acceptable criteria but solely upon race.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the petitioners should be ordered finally admitted to the United States as citizens on the basis of all the evidence which was favorable to them with the exception of the unconstitutional, conflicting and disputed blood tests. The fact that the Government may have belatedly some years later extended its blood testing procedure to non-Chinese probably as a result of the decision in this case supplies no basis for subjecting petitioners to further administrative hearings (R. 427). The petitioners are entitled to have their citizenship determined on the basis of the valid procedures existing in 1952 at the time of their application for admission and not on the basis of procedures which may have been adopted by the Government several years later.

Respectfully submitted,

EDWARD J. ENNIS
BENJAMIN GIM
Attorneys for Petitioners

In the usual non-Chinese derivative citizenship case, the parents of the applicants would normally be in close communication with the local American consulate. The claimants would usually reside in the "American colony" and the birth would be known and registered at the consulate. And even where this were not true, documentary proof of the marriage and birth would be readily available. Additionally, there would be a "baptismal certificate, school record, hospital records, medical certificates, census records * * * ", etc. (R. 285-286). Furthermore, an investigation could readily be made in the area where the birth was claimed and investigators could ascertain from friends, neighbors, and local officials the true identity of the child (R. 286).

In Chinese cases, on the other hand, corroborating documentary evidence or field investigation in the locale where birth is claimed is rarely—if at all—available. As already noted, the overwhelming majority of Chinese applicants rely on oral statements. No investigation of the locale would be feasible even under normal conditions since, as we have stated, the applicants generally claim birth in isolated villages not familiar to American authorities, nor listed on any available maps. And all possibility of conducting such an investigation is completely foreclosed by the political climate in China which has forced the closing of American Consulates. See Briggs, *American Consular Rights in Communist China*, 44 Am. Jour. of Int. Law 243.

This inability to check oral claims of paternity and identity through ordinary methods left the State De-

partment and the Immigration and Naturalization Service with only the unsatisfactory and at times unreliable procedure of seeking out discrepancies in the claimant's story and that of his alleged parents. Unwarranted importance might be placed on minor discrepancies, while a carefully rehearsed fraudulent story might succeed. Language differences, complex family relationships, and cultural distinctions have led to confusion.

For example, Chinese ages are not computed as in America, under the occidental calendar, but under a complex lunar calendar. A disproportionate percentage of applicants allege birth on the day of the month corresponding to the number of the month—a date easy to memorize. Report, p. 41, 54-55. There is marked similarity in Chinese homes and villages. The Chinese have several names which may be interchanged or spelled differently on different occasions.[14] Language differences compound the difficulties. Normal methods of testing credibility by the intonation, rapidity, hesitancy and manner of response are foreclosed. And at times the interpreters differ as to what the applicant has said. *Mar Gong* v. *McGranery*, 109 F. Supp. 821, 823-824 (S.D. Cal.), reversed, *sub nom. Mar Gong* v. *Brownell*, 209 F. 2d 448 (C.A. 9); *Dong Wing Ott* v. *Shaughnessy*, 116 F. Supp. 745 (S.D. N.Y.), affirmed, 220 F. 2d 537 (C.A. 2), certiorari denied, 350 U.S. 847; Report, pp. 52-53.

[14] Here, for example, during the service proceedings, petitioner's alleged mother was referred to as Wong Tew Hee, Tew Hee Wong, and Hee Tew Wong. See also Report, pp. 53-54.

The untrustworthiness of the "discrepancy test" to determine the validity of claims to American parentage has been pointed to on numerous occasions. For example, in *Soo Hoo Yin Deep* v. *Dulles*, 116 F. Supp. 25, 26 (D. Mass.), it was observed that "[m]uch of the testimony * * * had to be given through an interpreter. This, of course, adds to the difficulty of assessing the credibility of the witnesses through the manner in which they told their story." And in *Chin Wing Gwong* v. *Dulles*, 139 F. Supp. 116 (D. Rhode Island), the court noted (139 F. Supp. at 117):

> The testimony of each, punctuated as it was by frequent and extended exchanges in Chinese between the witness and interpreter, was at times difficult to understand and unsatisfactory.

See also, *Wong Suey Ming* v. *Dulles*, 130 F. Supp. 905, 907 (D. Mass.). These problems were the same for consular officials in Hong Kong as they subsequently became for the courts.

2. These potentialities for fraud which inhered in the situation were, before 1951, known to have been exploited. The number of male claimants was itself suggestive of fraud. An examination of 354 of the 716 cases arising in the Northern District of California shows that 367 of the claimants were male and only 39 female. Of 317 suits elsewhere in the United States, the ratio was 1215 male to 169 female. *Ly Shew* v. *Acheson*, *supra*, 110 F. Supp. at 56. In another survey of 149 cases involving 1267 Chinese-born applicants for derivative citizenship, the ratio

was 8.05 males to 1.0 females. By comparison, children of Chinese descent, born in the United States, show a ratio of 1.06 males to 1.0 females.[15]

In the Northern District of California alone, between 1947-1950, there were 53 prosecutions against Chinese based on falsified birth certificates or travel documents. *Ly Shew* v. *Acheson*, 110 F. Supp. 50, 56 (N.D. Cal.). While the full extent of the fraud was not developed to the point of prosecution until after the period here involved,[16] the pattern of fraudulent operations was already known by 1951. Cf. Report, pp. 62-77.

As we have noted, Chinese male citizens returning from visits to China, would, upon return, report to the immigration authorities the birth of children in China. There were instances of the putative fathers' reporting the maximum number of children that could have been born and conceived during their visits. The identities so created, called "immigration slots," were then sold through "brokers" to individuals anxious to enter the United States.

These "brokers" run extensive and well organized

---

[15] Schatkin, Sussman and Yarbrough, *op. cit.*, 2 Cr. L. Rev. at 51-52.

[16] Grand jury investigations of fraud perpetrated in Chinese cases were held in New York and California in 1956. As a result, 100 declaratory judgment suits were voluntarily dismissed in the Northern District of California, and 30 in the Southern District of New York, by the end of the year. Four indictments were returned in New York in 1956 which, *inter alia*, charged operations of organized rings to bring in Chinese. Annual Report of the Attorney General of the United States (1956) pp. 111-113.

coaching schools in Hong Kong at which purchasers of "slots" are taught, to the minutest detail, the family history of the Chinese-American whose parentage they claim. "Halgoons", family history coaching books (see *Lue Chow Kon* v. *Brownell*, 122 F. Supp. 370, 372 (S.D. N.Y.), affirmed, 220 F. 2d 187 (C.A. 2)), have been sold at great profit.[17] It is reliably reported that for all their services to the applicants the "brokers" have extracted fees averaging $2,000.[18] Thus, a "discrepancy" test of validity, the only technique then available to administrative authorities and the courts, tended to favor the unscrupulous, cleverly trained applicant to the detriment of the honest, confused claimant. It was felt that compatible blood-testing would not only aid in the detection of false claims, but at the same time affirmatively benefit those applicants, who, although without reliable documentary evidence, were asserting valid claims. The adoption of blood-testing amelio-

---

[17] Report, pp. 27-34; cf. Schatkin, Sussman & Yarbrough, *op. cit.*, 2 Crim. L. Rev. at 49-51. These authors point out (p. 49) that after the applicants have memorized a family history, they are given four rules:

"(1) always answer, 'I don't know', or 'I don't remember', to any question not covered by the coaching book; (2) never volunteer information; (3) always be as vague as possible; and (4) never, under any circumstances, admit having been coached or assisted."

[18] Schatkin, Sussman & Yarbrough, *op. cit.*, 2 Crim. L. Rev. at 50; Annual Report of the Attorney General of the United States (1956), pp. 111-113. After blood testing techniques were adopted, the "brokers" instituted preliminary blood-testing to choose "parents" for the applicants whose blood types would be compatible with those of the applicants.

rated the difficulties inherent in the discrepancy test by providing some scientific means of evaluating the alleged relationship. And although a blood test compatible with the claimed relationship does not in and of itself establish the claimed relationship, it has been utilized affirmatively, along with other evidence, to hold that the applicants have met their burden of proof. *Wong Chong Oy* v. *Dulles*, 132 F. Supp. 483 (D. Minn.).[19]

The technique was, in fact, shown to be useful in uncovering fraud at least until applicants became sufficiently aware of the test to take precautionary measures to assure compatibility. Blood tests conducted in Hong Kong a few months after this investigatory procedure was adopted by the State Department revealed that 40% of the applicants tested were asserting fraudulent claims.[20] Of 34 families tested in New York City where both the alleged parents were available for blood-testing, approximately 20% of the applicants were excluded, while in 71 families

---

[19] Other investigatory techniques, including X-rays, radiological and clinical examinations, have also been employed, primarily in testing the age of the applicants. *E.g.*, *Wong Fook Ngoey* v. *Nagle*, 300 Fed. 323 (C.A. 9); *Hom Ark* v. *Carr*, 105 F. 2d 607 (C.A. 9). In Canada where a like problem exists in determining issues of paternity and identity in Chinese cases, blood testing and X-rays have been employed. Cf. Report pp. 43-47.

[20] Since false relationships can be detected by blood tests in only about 50% of the cases, the number of fraudulent claims was undoubtedly considerably higher. Schatkin, Sussman & Yarbrough, *op. cit.*, 2 Cr. L. Rev. at 50.

where only the alleged father and child were available, there were 8 exclusions.[21]

In short, blood testing in Chinese derivative citizenship cases was not an unconscionable technique developed to meet a non-existent problem. The problem was a real one, and the test technique was an appropriate method of helping to solve it. Cf. *Breithaupt* v. *Abram*, 352 U.S. 432, 435-437.

C. ***After blood-testing techniques were found helpful in meeting the problems of identity and paternity in cases which were concentrated in the Hong Kong area, the technique was utilized generally.***

The State Department started to use blood tests in the Hong Kong area in 1951. The Immigration and Naturalization Service first commenced blood testing, in cooperation with the State Department, in 1952. In 1953, the Service itself adopted the practice, and used it primarily in cases involving Chinese applicants for certificates of derivative citizenship where paternity and identity were in doubt. As pointed out in the Statement, *supra*, p. 9, at the time petitioners were tested (July and August, 1952) there were no Service instructions relating to blood-testing. Thereafter, instructions in visa petition cases were issued which referred specifically to Chinese but did not limit the tests to Chinese applicants. In 1954, new instructions were adopted predicating blood-testing on the nature of the case and the issue of

---

[21] Schatkin, Sussman & Yarbrough, *Blood Test Evidence In Detecting False Claims of Citizenship*, 3 Cr. L. Rev. (Autumn 1956) 45, 46; Cf. Report, pp. 62-77.

paternity or relationship involved. No special instructions were ever issued as to exclusion proceedings (*supra*, p. 10).

Since 1953, and continuing to date, the State Department has authorized its consulates throughout the world to utilize blood-testing where deemed necessary to solve doubtful issues of paternity and identity, regardless of the applicant's race (R. 101). The Immigration and Naturalization Service also expanded use of blood-testing so that within two years of its adoption it was to be applied in every case, irrespective of race, wherever deemed necessary. In 1955, the Service blood-tested about 60 non-Chinese of wide divergence in race and national origin where the nature of the case made such action appropriate (R. 93, 96-98).

When petitioners were tested, blood-testing was a newly adopted technique developed with respect to Chinese cases but not exclusively limited to such cases. Lester Friedman—at that time, attorney-advisor to the Immigration & Naturalization Service who "* * * had had first-hand knowledge of all policy decisions and had participated in thousands of litigated cases * * *" (237 F. 2d at 310)—testified at the Service hearings in this case that blood-testing was never intended to be a tool for racial discrimination. He further noted that, during the period 1952-1954, blood-testing was applied in at least four non-Chinese cases—two in New York and two in Los Angles (see the Statement, *supra* p. 10, n. 3).

II

The Use of a Special Technique To Meet a Special Problem Is Not Unconstitutional Discrimination.

1. It is well settled that legislation reasonably directed at correcting a particular problem is not violative of the equal protection clause of the Fourteenth Amendment even though such legislation is specifically limited to a particular group or class. The test is whether the legislation hits at an evil within the police power of the state to correct.[22] And certainly the due process clause of the Fifth Amendment—under which the instant claim is to be decided—is at least equally as tolerant of reasonable Congressional classification. In *National Labor Relations Board* v. *Jones & Laughlin*, 301 U.S. 1, 46, this Court observed:

> We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. [Citations omitted.]

---

[22] See, *e.g.*, *Salsburg* v. *Maryland*, 346 U.S. 545, 551; *Middleton* v. *Texas Power & Light Co.*, 249 U.S. 152, 157-158; *Miller* v. *Wilson*, 236 U.S. 373, 383-384; *Semler* v. *Dental Examiners*, 294 U.S. 608, 610-611; *Hurwitz* v. *North*, 271 U.S. 40; *Watson* v. *Maryland*, 218 U.S. 173, 179-180; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79; *Metropolitan Co.* v. *Brownell*, 294 U.S. 580, 584; *Missouri* v. *Lewis*, 101 U.S. 22, 31; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400; Corwin, *The Constitution of the United States of America*, Senate Document No. 170, 82d Cong., 2d sess. (1953 ed.), pp. 1145-1146, 1153-1156, n. 2.

And, in *United States* v. *Petrillo*, 332 U.S. 1, the Court specifically rejected the argument that Section 506(a)(1) of the Communications Act violated the due process clause of the Fifth Amendment in that such legislation only applied to broadcasting employees. Mr. Justice Black, speaking for the Court, stated (332 U.S. at 8-9):

> * * * Secondly, it is argued, the Act violates due process because it singles out broadcasting employees for regulation while leaving other classes of employees free to engage in the very practices forbidden to radio workers. But it is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. * * * Nor could we strike down such legislation, even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area. Here Congress aimed its law directly against one practice—compelling a broadcasting company to hire unneeded workers. There is nothing novel about laws to prohibit some persons from compelling other persons to act contrary to their desires. Whatever may be the limits of the power of Congress that do not apply equally to all classes, groups, and persons, see *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584, we are satisfied that Congress has not transgressed those limits in the provisions of this statute which are here attacked.

See, also, *Hirabayashi* v. *United States*, 320 U.S. 81, 100; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-585; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381,

401; *Detroit Bank* v. *United States*, 317 U.S. 329, 337-338.

2. Undoubtedly, even though the Fifth Amendment has no equal protection clause, grossly discriminatory legislation or grossly discriminative administrative action, especially if predicated on racial grounds, would violate federal due process. *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *Hirabayashi* v. *United States*, 320 U.S. 81, 100; *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 202; *Hurd* v. *Hodge*, 334 U.S. 24, 30; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. But there was no discrimination on racial grounds, as such, in this instance. The use of blood-testing techniques first developed in Chinese cases in the Hong Kong area because the problem was concentrated there. It was first used in this country in Chinese cases because of the same problems, and because by the time its usefulness was realized, a number of applicants presenting those problems had already arrived in this country. Just as it is erroneous to argue that " * * * because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power." *United States* v. *Petrillo*, 332 U.S. 1, 8, it is invalid to strike down blood-testing in Chinese cases because it might have been—but was not—immediately adopted in non-Chinese cases. An evil may be dealt with " * * * where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States*, 320 U.S. 81, 100. So here, blood-testing was utilized to deal with a critical problem and its validity does not depend on its further extension to other areas.

On two prior occasions the Second Circuit rejected the argument that blood testing of Chinese is unconstitutional discrimination. *Dong Wing Ott* v. *Shaughnessy*, 220 F. 2d 537, certiorari denied, 350 U.S. 847; *Lue Chow Kon* v. *Brownell*, 220 F. 2d 187.

In *Dong Wing Ott*, the Court observed (220 F. 2d at 540):

> Such a classification based on the lack of reliable written governmental records of birth and parentage, difficulty of access to the areas from which the claimed family groups come, and long absences from the family group of the citizen father who is an identifying witness, are circumstances justifying the distinction as one not based on race or color.

Also in *Lue Chow Kon*, the court pointed out, that even if it were established "* * * that the tests were given only to Chinese * * *, it would not in itself show that discrimination was based on race or color. The conditions in China during the period in question posed such great obstacles to investigation by ordinary means into family history and evidence of parentage that resort to the tests to aid in determination of parentage or non-parentage of persons from the area is an entirely reasonable requirement" (220 F. 2d at 190).

The mere fact that members of a particular group or persons coming from a particular geographical area may be subjected to tests which are not given to others should not, in and of itself, render the testing unconstitutional. For example, it could not validly be contended that subjecting susceptible appli-

cants for admission to the United States to tests designed to detect the presence of dangerous diseases would violate due process unless such tests were also given to persons not likely to be so infected. Thus, in *Hee Fuk Yuen* v. *White*, 273 Fed. 10 (C. A. 9), certiorari denied, *sub nom. Pang Hing* v. *White*, 257 U. S. 639-640, Chinese merchants (not within the exclusion Acts) were denied reentry into the United States because physical examinations revealed that they were suffering from clonorchiasis—a dangerous contagious disease. They challenged, *inter alia*, the fact that they were compelled to undergo physical examination while non-Chinese, first class cabin passengers, were not similarly required to undergo physical examinations. In rejecting the charge of discrimination, the court said (273 Fed. at 14-15):

> * * * if special examination was made of second class Oriental passengers only, it should be assumed that it was done for the reason that the disease of clonorchiasis was most likely to be found among such passengers, the source of the disease being supposed to be a diet of raw fish, and it should be assumed that in failing to subject first-class passengers to like test there was no discrimination against Chinese persons, or withholding of their rights. The officers presumably did their duty in subjecting the petitioners to the test. *If they failed to do their duty as to other passengers, it is not a ground for disturbing the conclusions of the board of special inquiry as to the appellants.* [Emphasis added]

The Manual for Medical Examination of Aliens, issued by the United States Public Health Service,

provides that special tests to determine the presence of amebic dysentery, a dangerous contagious disease, shall be required " * * * of all persons from rural areas of countries such as Japan and Greece where the disease is common." (Page 9-2). Surely a person excluded because medical examination detected the presence of the contagious disease is not deprived of due process because persons coming from areas where the disease is not prevalent are not also subjected to like tests. In this case, as in those relating to medical problems of a particular area, scientific tests have been employed to meet peculiar problems. In neither case is the specialized treatment motivated by racial or national prejudice; in neither case should the testing, even if limited to one group, be considered unconstitutional.

3. The District Court concluded that because four Chinese applicants from Hong Kong were blood-tested, even though they had birth certificates or normal field investigations to establish their identity were possible or had been conducted, the entire Chinese blood testing program, at the time petitioners were tested, was motivated by racial discrimination. (133 F. Supp. at 852-853).

Four isolated cases provide no basis for a finding of a purposeful policy of racial discrimination.[23] Available statistics show that in the same period a significant number of Chinese applicants for derivative citizenship were never blood-tested. Of 124 Chinese cases arising from March 1, 1952, through Sep-

[23] Mr. Friedman testified that the overwhelming proportion of Chinese applicants are admitted to the United States (R. 373-375).

tember 30, 1952 (petitioners were tested in July and August 1952), the Immigration and Naturalization Service blood-tested only 84; 40 were admitted to the United States after a preliminary inspection, or after hearing before a Board of Special Inquiry (R. 94). And of 6,000 passports issued to Chinese by the State Department from August 1952 through August 1955, only 850 of the applicants were required to undergo blood tests (R. 101). Apart from this, since the technique of blood-testing originated in the Chinese cases, it is quite understandable that local officers might, as a precautionary measure, blood-test applicants even though they had birth certificates. Even if a birth certificate were valid in all respects, it might not belong to the person presenting it (R. 284-286). In any event, four isolated cases hardly establish an conscious prejudice at the policy making level. An overabundance of caution, or even mistaken action by local officials in a few cases, cannot properly be held out as indicia of an overall administrative policy to discriminate against Chinese because of color or race.

Congress did not arbitrarily discriminate against radio workers when it singled out broadcasting as needing protection from feather-bedding—a practice known in other fields. *United States* v. *Petrillo*, 332 U. S. 1. It did not unconstitutionally discriminate against non-agricultural employees when agricultural workers were exempt from the social security tax. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585. So here, the administrators were not unconstitutionally discriminating against Chinese when they first devel-

oped a technique to meet a particular problem which, for all the reasons discussed *supra*, was most acute in Chinese cases.

III

Even If Blood Testing Had Been Erroneously Limited, There Would Be No Reason To Exclude the Evidence In This Case.

Even if it be assumed *arguendo* that the administrative agencies at one time erroneously utilized blood tests within a group which was more limited than it should have been, that does not seem to us a reason to exclude the evidence in this case. This Court, by its limited grant of certiorari, has left undisturbed the ruling of the court below that the administrative authorities are justified in using blood testing techniques in exclusion cases when paternity is in doubt. Petitioners' argument is that, if the technique was discriminatorily used, the evidence obtained thereby should be excluded, not because it is untrustworthy, but because the court should not receive it. Judge Frank, in his dissent below, explicitly drew the analogy to evidence excluded because obtained by an unlawful search-and-seizure.

1. Applying an exclusionary rule to these cases would extend such rule beyond its development in other fields, including criminal cases. In the Fourth Amendment and confession cases, evidence is excluded where, looking solely to the facts of the particular case, there is found to have been a direct violation of an existing personal right of the defendant. A truly analogous case would be one where the *validity* of the search itself is not in issue but the defendant

asserts its invalidity on the sole ground that in another, comparable case, no search had been made, thus allowing another guilty person to go free. In such a case the exclusionary rule should not be invoked because the defendant would not be asserting violation of a personal right but would be basing his claim on an error in another case. And surely, the facts of this case do not call for a new and broad application of the exclusionary rule, extending it so that evidence would be excluded even though there was no defect in the particular proceeding by which the evidence was obtained.

This is not a case where persons of Chinese descent, although qualified as American citizens, were denied entry on an arbitrary basis. It is a case where non-qualified Chinese were denied entry on the basis of evidence whose invalidity arises at most only from the fact that similar techniques were not employed against others. We do not permit a defendant to escape punishment because another person should also have been prosecuted. All the more reason that petitioners should not affirmatively be allowed to obtain rights they do not have because some other persons should also perhaps have been excluded.[24]

---

[24] In *Quan Hing Sun* v. *White*, 254 Fed. 402 (C.A. 9), in addition to procedural defects in the administrative hearing, the court found that the claimant might well have been denied entry as the son of an American citizen whether or not he had established his rights pursuant to R.S. 1993, because of the unrelated and arbitrary administrative requirement that he prove himself to be a dependent member of the household of his American parent as a condition precedent to his admission as the son of an American citizen. In

2. If the rule of exclusion of evidence were regarded as a means of disciplining government officials, irrespective of the personal rights of the petitioners, there would still be no occasion to apply it here. Even if it be assumed that the State Department and the immigration authorities used blood tests only in Chinese cases in the inception of the practice, and that this was error, it was at most an error of judgment arising out of the special circumstances which existed in Hong Kong. Any such limitation was abandoned by the State Department by 1953 within two years after the technique was first used and in 1955 by the Immigration Service. There would thus be no occasion for this Court, under its power to fashion rules of evidence, to extend the rule of exclusion to this situation and to exclude probative evidence, obtained without violation of any of petitioners' personal rights, in a way which would confer upon petitioners citizenship which they do not possess and to which they are not entitled.

---

contrast to this case, the claimant there might have had a right as an American citizen which was being denied because of a requirement unrelated to citizenship.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 438805 373

Office Supreme Court, U.S.
FILED
NOV 20 1957
JOHN T. FEY, Clerk

No. 32

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA EX REL. LEE KUM HOY, ET AL., PETITIONERS

v.

JOHN L. MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN RESPONSE TO PETITIONERS' MOTION TO STRIKE

J. LEE RANKIN,
Solicitor General,

RUFUS D. McLEAN,
Acting Assistant Attorney General,

JOHN F. DAVIS,
Assistant to the Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 32

UNITED STATES OF AMERICA EX REL. LEE KUM HOY, ET AL., PETITIONERS

v.

JOHN L. MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN RESPONSE TO PETITIONERS' MOTION TO STRIKE

The petitioners have filed a motion to strike the Foreign Service Report on the Problem of Fraud at Hong Kong forwarded to the State Department on December 9, 1955, by Everett F. Drumright, Consul General. Ten copies of this report were filed with the Court by the government at the time it filed its brief (Br. p. 19, fn. 4).[1] The respondent believes that

[1] Although the report was filed on September 25, 1957, the motion to strike was served on the Solicitor General on November 18, 1957, in the very week in which the case is calendared for argument. Thus, the time for response is limited.

the report is proper background material, appropriate for consideration by the Court, and that the motion should be denied.

1. The principal issue in this case, as fixed by order of the Court (R. 430), is whether there was an unconstitutional discrimination against the petitioners. This depends not only on whether blood testing was limited to persons of Chinese ancestry, but, if so, whether there were circumstances justifying such limitation. The circumstances giving rise to the practices followed are, of course, not limited to the facts of the petitioners' own cases; they constitute the climate in which the particular facts of the cases took place. Similarly, in considering the constitutionality or construction of regulatory statutes, the Court has frequently made extensive reference to studies and reports, both official and unofficial, to determine exactly what problem the legislature was seeking to solve. See e. g., *Muller* v. *Oregon*, 208 U. S. 412, 419, fn. 1; *Bunting* v. *Oregon*, 243 U. S. 426; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 150; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 395; *United States* v. *Felin & Co.*, 334 U. S. 624, 637. And see also Brandeis, J., dissenting in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280. Cf. *Brown* v. *Board of Education*, 347 U. S. 483, 494, fn. 11. As to whether the particular report was an appropriate one to call to the Court's attention, it is an official document of which the Court may take judicial notice without the necessity of a formal introduction in evidence. *The Apollon*, 9 Wheat. 361, 374; *New York*

Indians v. *United States*, 170 U. S. 1, 32; *Jackson* v. *United States*, 230 U. S. 1, 18.

2. The petitioners complain that the report contains unproved charges which they may not test by cross-examination (Motion p. 2). The truth of the facts set forth in the report is not in issue and, strictly speaking, cross-examination to test its accuracy should have been denied even if the report had been produced at the administrative level. Whether or not the situation is accurately portrayed in the report, it still constitutes part of the circumstances in which the practice of administering blood tests was adopted. Wholly apart from the truth or falsity of the facts reported, the report has a direct bearing on whether the use of the tests was motivated by race prejudice or in an attempt to meet fraudulent practices believed to prevail. Petitioners themselves do not hesitate to cite annual reports of the Immigration Service to support their counter argument that the pressures for admission and the use of fraud to procure admission were not limited to applicants of Chinese ancestry (Pet. Reply Brief, p. 8).

3. Petitioners also complain that the report "is replete with unsupported dubious generalities which disclose the racial bias and antagonisms of the author or authors." (Pet. Reply Brief, p. 7.) This is not a fair reading of the report which attempts to support its conclusions with a wealth of detail related in a dispassionate manner. Moreover, it is odd that petitioners should object to its consideration on this ground since the appearance of such bias would di-

rectly support their case. The fact of the matter is that, whatever judgment is made of the report, it is part of the background of the practices followed by the immigration authorities and is appropriate for consideration by the Court.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

JOHN F. DAVIS,
Assistant to the Solicitor General.

NOVEMBER, 1957.

No. 32

In the Supreme Court of the United States

October Term, 1957

UNITED STATES OF AMERICA EX REL.
LEE KUM HOY, ET AL., PETITIONERS

v.

JOHN L. MURFF, District Director,
Immigration and Naturalization Service

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL MEMORANDUM AFTER ARGUMENT

J. LEE RANKIN,
Solicitor General,

RUFUS D. MCLEAN,
Acting Assistant Attorney General,

JOHN F. DAVIS,
Assistant to the Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

October Term, 1957

No. 32

UNITED STATES OF AMERICA EX REL.
LEE KUM HOY, ET AL., PETITIONERS

v.

JOHN L. MURFF, District Director,
Immigration and Naturalization Service

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL MEMORANDUM AFTER ARGUMENT

In the course of oral argument, counsel for the Government was asked to provide the Court with information on several aspects of the case.

1. In connection with the State Department dispatch submitted to the Court, the Chief Justice asked that it be ascertained whether the document had ever been classified and, if so, when it was declassified. We are informed by the State Department that the document in question has never been classified. It first received publicity outside of the several government offices to which it was distributed when an

article concerning it, entitled "Commentary on the Drumright Report", was published by a Chinese language newspaper in San Francisco in May, 1956.

2. In response to Mr. Justice Harlan's inquiry as to the extent to which the Government brief relies on the report for its statements of fact, we believe that wherever reliance is placed on the report a specific reference is made to it. Such references are noted at pages 21, 23, 25, 27, 29, 30, 31 and 32. However, in most of these instances the facts stated could equally have been based on Mr. Friedman's testimony, R. 365a-372a, or to the reported decision in *Mar Gong* v. *McGranery*, 109 F. Supp. 821 (S.D. Cal.).

3. Mr. Justice Frankfurter asked whether statistics are available to show the number of American citizens born in China who have made application for entry as compared with American citizens born in other foreign countries. Inquiry has been made of both the Immigration and Naturalization Service and the State Department, and we are informed that such figures are not available and cannot readily be obtained. We are further informed that, if such figures could be collected, their value to the subject matter of this case would be doubtful since they would include children of American couples temporarily abroad on government or private business. In petitioners' reply brief, reference is made to 1954 and 1955 figures on "Certificates of Derivative Citizenship". I attached a copy of the Immigration and Naturalization Service's Annual Report for 1956, which reprints those figures and those for 1956 at

page 121. However, these are not meaningful for the purpose of this case since certificates of derivative citizenship are granted only to persons in the United States whose parents have acquired citizenship after their birth. The situation is thus dissimilar to that involved here. The figures on alien children of American citizens admitted as nonquota immigrants in 1956, referred to for the year 1954 by petitioners on page 8 of their reply brief, appear on page 38 of the same report. Their application to the question before the Court is also remote.

4. The Chief Justice asked about the testimony with reference to the accuracy of the blood testing procedures in the particular case. Dr. Sussman's testimony appears at R. 168a-185a, Mr. Frank Monica's at R. 191a-208a, and Dr. Cameron's at R. 208a-216a. This testimony is summarized by the Special Inquiry Officer at R. 226a-231a and by the Board of Immigration Appeals at R. 247a-265a.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

RUFUS D. MCLEAN,
Acting Assistant Attorney General.

JOHN F. DAVIS,
Assistant to the Solicitor General.

NOVEMBER, 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957 446854 742